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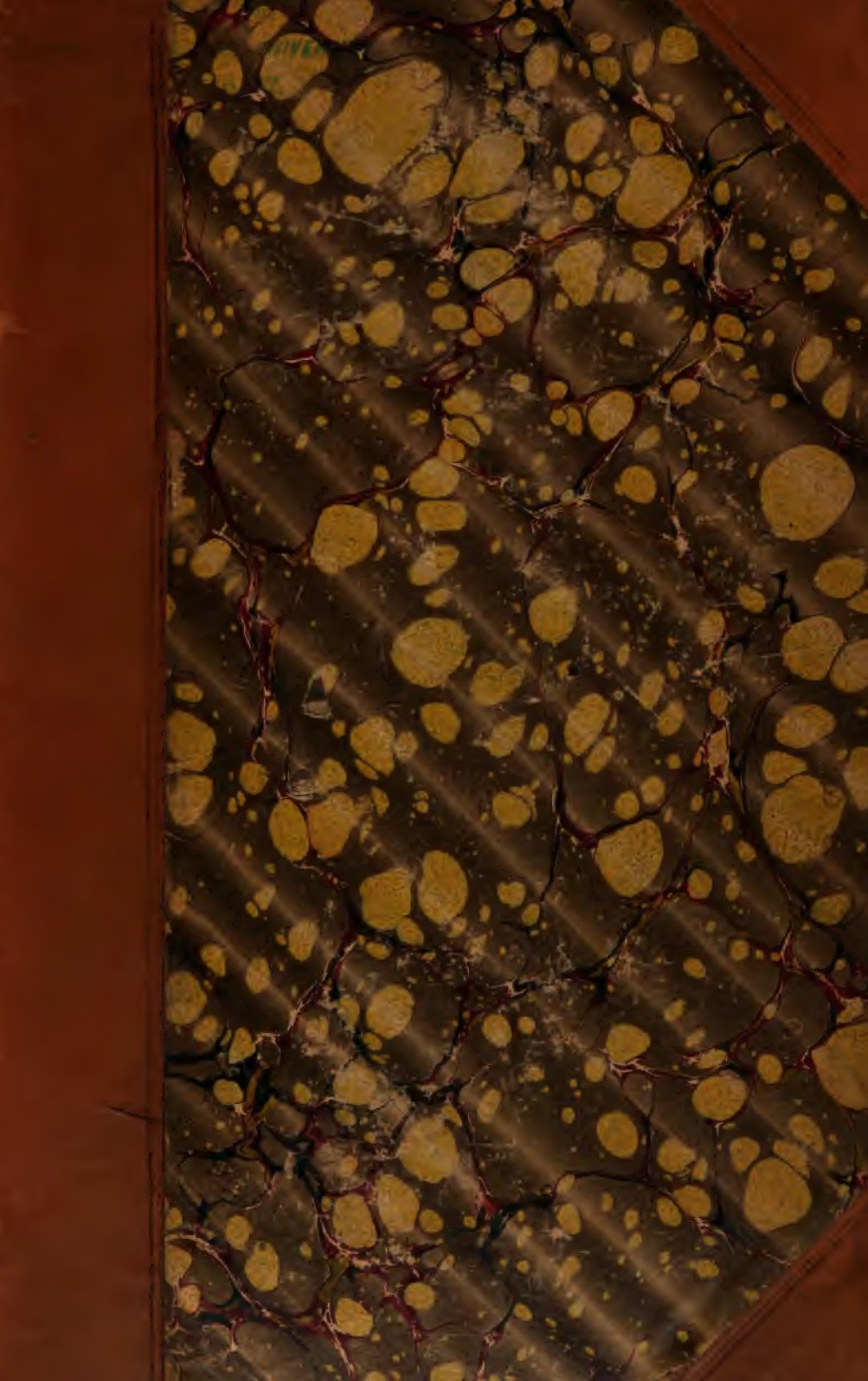
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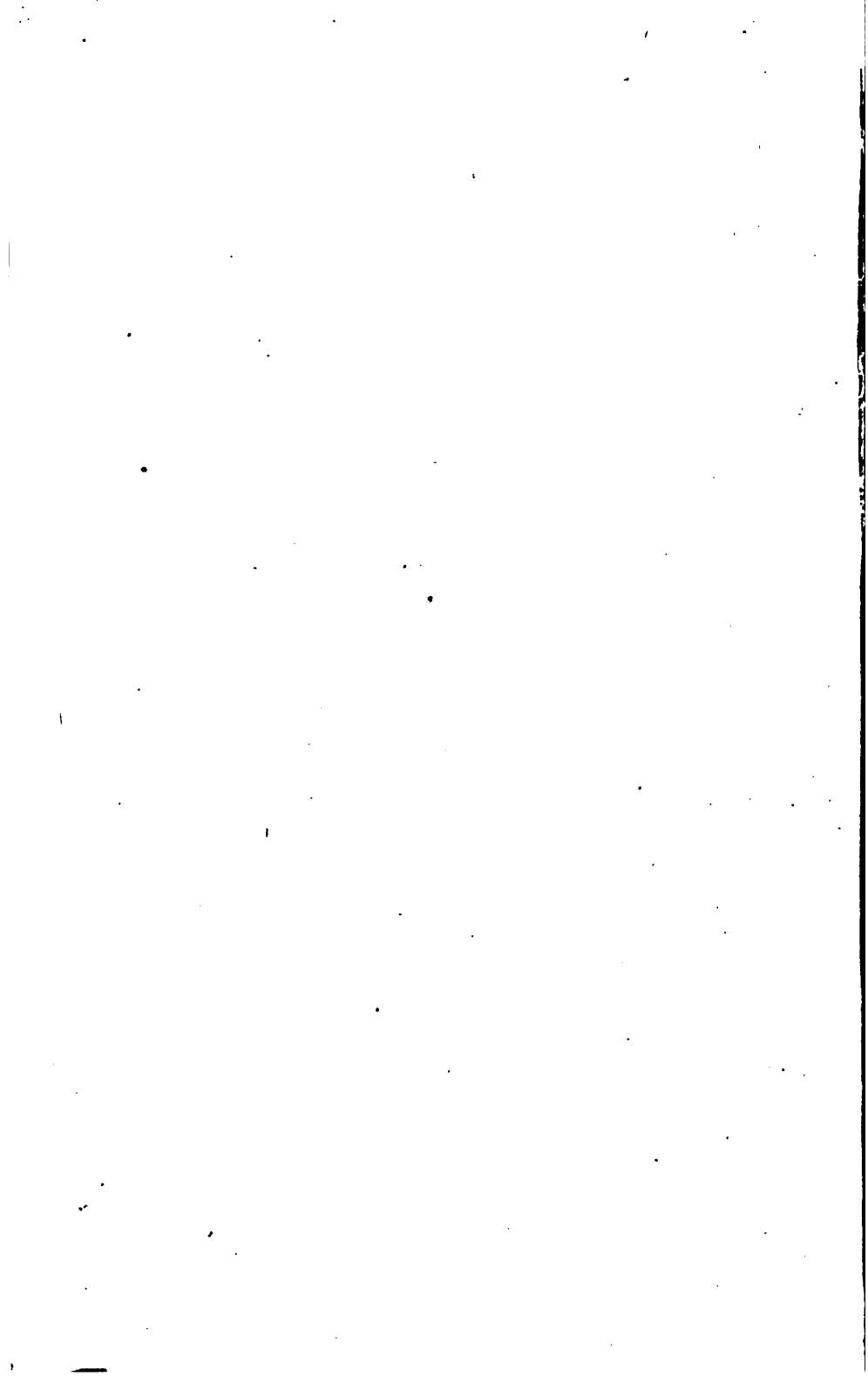
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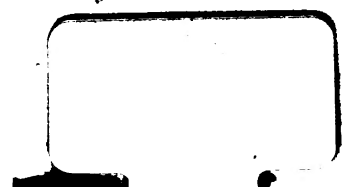
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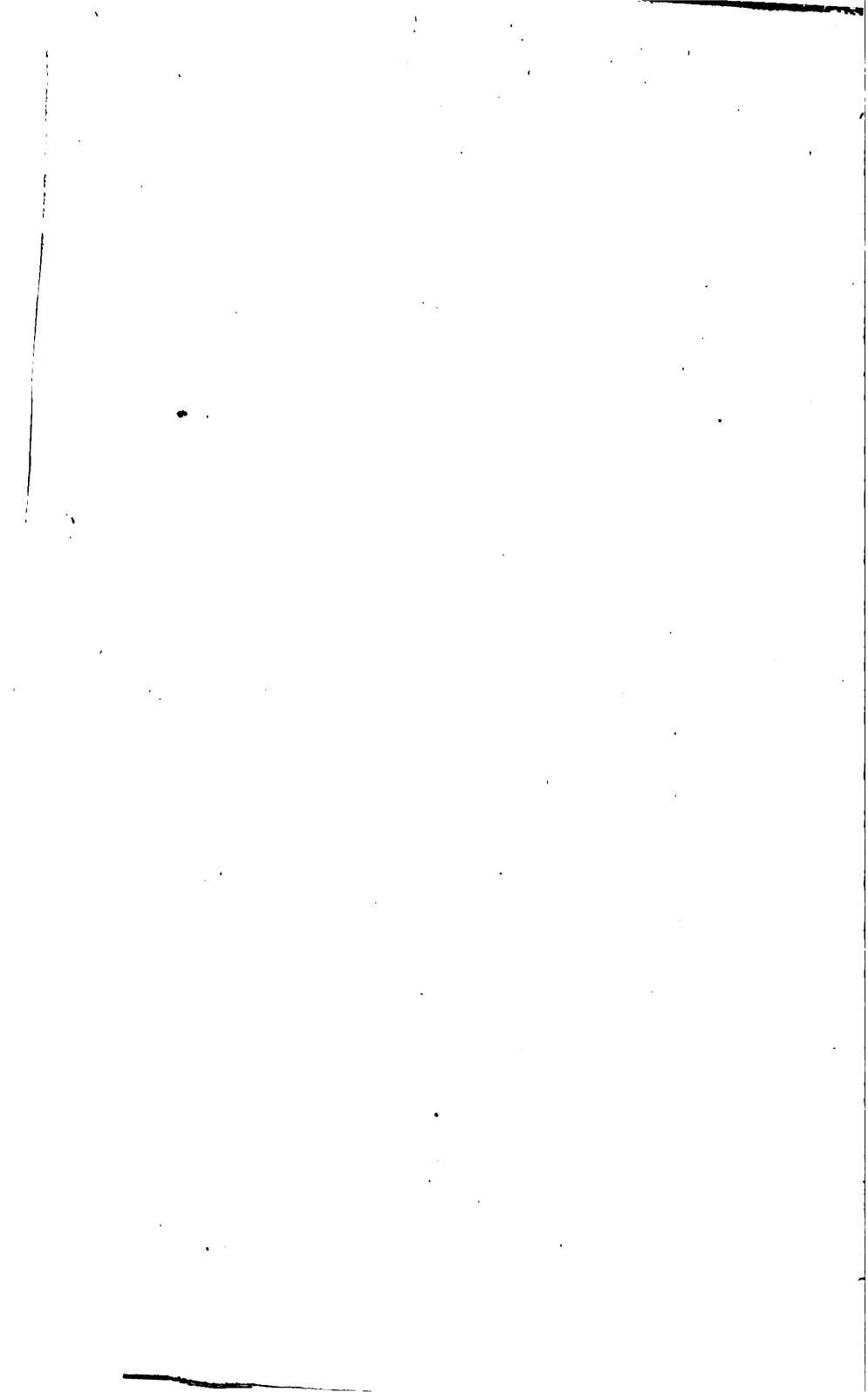




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English Notes
By William



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CONTENTS.

	Page
ART. I.—REGISTRATION UNDER THE REFORM ACT.	
The Law and Practice of Elections of Members of Parliament, and of the Trial of Petitions before Election Committees. With an Appendix, containing Forms, and the English, Irish, and Scotch Statutes on the subject, in Chronological Order to the present Year. Third Edition. By H. I. Shepherd, Esq. of Lincoln's Inn, Barrister at Law	1
ART. II.—LIFE OF LORD CHANCELLOR TALBOT.	43
ART. III.—THE DOCTRINE OF LIEN	60
ART. IV.—MERCANTILE LAW, NO. XVI.—MERCHANT SHIPPING—continued.	83
ART. V.—COSTS IN TRESPASS TO REAL PROPERTY	115
ART. VI.—ON THE PRESENT STATE OF CRIMINAL LEGISLATION AND JURISPRUDENCE IN GERMANY AND SWITZERLAND	119
ART. VII.—CHANCERY REFORM—PROPOSED DIVISION OF THE CHANCELLORSHIP.	
A Letter to the Right Hon. Viscount Melbourne, on the Present State of the Appellate Jurisdiction of the Court of Chancery and House of Lords. By the Right Hon. Sir Edward Sugden	128
ART. VIII.—THE BROUGHAM AND COOPER REPORTS.	
Select Cases decided by Lord Brougham in the Court of Chancery, in the years 1833 and 1834, edited from his Lordship's original Manuscripts. By Charles Purton Cooper, Esq. Barrister at Law. Vol. I.	146

	Page
DIGEST OF CASES.	
Common Law.	150
Equity.	199
Bankruptcy.	213
List of Cases.	217
TABLE SHOWING THE OPERATION OF THE BANKRUPTCY SYSTEM	226
FOREIGN JURIDICAL INTELLIGENCE	230
EVENTS OF THE QUARTER.	235
LIST OF NEW PUBLICATIONS.	238

CONTENTS.

	Page
ART. I.—TRIAL OF LA RONCIERE.	
Procès du Sieur de la Roncière	241
ART. II.—LORD JOHN RUSSELL'S BILL FOR REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS	274
ART. III.—LIFE OF SIR WILLIAM BLACKSTONE	292
ART. IV.—LADY HEWLEY'S CHARITIES.—CASE OF THE AT- TORNEY-GENERAL V. SHORE	316
ART. V.—MERCANTILE LAW, NO. XVII.—MERCHANT SHIP- PING, <i>continued</i>	354
ART. VI.—ON THE SALE AND ASSIGNMENT OF OFFICES, &c.	382
ART. VII.—THE PRISONERS' COUNSEL BILL	394
DIGEST OF CASES.	
Common Law.	403
Equity.	456
Bankruptcy.	468
List of Cases.	480
ABSTRACT OF PUBLIC GENERAL STATUTES.	491
NEW RULES	492

	Page
BIOGRAPHICAL NOTICE OF THE LATE HENRY ROSCOE, ESQ. . .	495
THE BILLS FOR THE AMENDMENT OF THE LAW OF WILLS, OF EXECUTORS AND ADMINISTRATORS, AND OF DEEDS . . .	497
EVENTS OF THE QUARTER.	499
LIST OF NEW PUBLICATIONS	502
INDEX	505

THE LAW MAGAZINE.

ART. I.—REGISTRATION UNDER THE REFORM ACT.

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	Page
BIOGRAPHICAL NOTICE OF THE LATE HENRY ROSCOE, ESQ. . .	495
THE BILLS FOR THE AMENDMENT OF THE LAW OF WILLS, OF EXECUTORS AND ADMINISTRATORS, AND OF DEEDS . . .	497
EVENTS OF THE QUARTER.	499
LIST OF NEW PUBLICATIONS	502
INDEX	505

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expense and the inconveniences of the revision would proceed for some years in a diminishing ratio.

The revision of the lists in 1835 was conducted under very different auspices. Parties had not, until that time, become fully aware of the working of a system of Registration, in a country where nothing of the sort had before existed. They had not learnt to estimate the advantage which it gives to the united and the active over the scattered and the indolent. It had not been understood what facilities the provisions of the Reform Act afford for the insertion of bad votes on the Register: nor, on the other hand, what advantage the power of indefinite objection gives to those who are inclined to use it without scruple; how it can be made to serve as an engine not only for the extirpation of bad votes, but also to entrap the *bonâ fide* claimant who has been unwary in his mode of entering himself on the Lists. To these circumstances must be added the unparalleled political excitement which then prevailed, arising out of the great changes which the general election of 1835 had brought about, and the nicely balanced power of the two contending parties; and, moreover, the comparative neglect of the Registration by both in the preceding year. The Conservatives were the first in the field. "The battle of the country is to be fought in the Registration Courts" was the announcement of their journals: and their adversaries, although somewhat reluctantly, as men who had less taste for the pecuniary consequences of the quarrel, accepted the challenge. All the provincial address and ingenuity, which usually find too narrow room in the precincts of a Magistrates' Chamber at Petty Sessions, or before an Under Sheriff, were set to work on the Reform Act: every means of vexation and chicanery—we speak generally, and know that our assertion is too generally true—was unscrupulously resorted to by both parties: seldom, indeed, was any reluctance evinced to use the opportunities which the Act unfortunately gives for sowing tares among the wheat, and also for rooting out tares and wheat together. We are far from casting any blame on persons who were acting zealously and ably in the office they had undertaken, and we know how difficult it is for anything like fair practice to exist, where each party is afraid to leave the smallest advantage open to his adversary.

But when the warfare which was carried on was of so unpromising a nature, and when the limited power of the Barristers could not in any way suffice to check the evils of which they were abundantly conscious, is it any wonder that a general dissatisfaction should be found to exist with the results of the present Registration, and that a vast proportion of blame of the most unmerited kind should have fallen on the persons charged with the function of Judges in the Courts of Revision?

We may say at once, in order to prevent any further recurrence to this branch of our subject, that we are writing under a full impression of the inadequacy of some of those persons to the fulfilment of the duties imposed upon them. We could easily, were we so inclined, enrich our paper with authenticated instances of most extraordinary decisions; evincing, in some cases, not merely an indistinctness of apprehension as to the force of various provisions in the Reform Act itself, but a marked want of that preliminary knowledge of law and legal principle which is wanted for the use of every day. We could cite lamentable examples of Conveyancers called from their chambers in the basements of our Inns of Court to determine on questions regarding *vivâ voce* evidence, and newly-called Sessions Barristers brought from their attics to be plunged into the mysteries of mortgages, powers, appointments, and equitable estates. But these matters we leave untouched; premising only, that no small part of the vituperation to which Barristers have been exposed has been drawn, by writers in the London press, from reports in the provincial newspapers, on which, for the most part, no reliance whatever could be placed. It is of more importance to show, as we shall endeavour to do in a few words, that the great source of difficulty to Barristers, and of dissatisfaction with their proceedings, arises, not from their occasional errors, but from the impossibility of putting into practice the strict letter of the Act, and the consequent want of uniformity in the decisions of Judges, each of whom was endeavouring to find out some equitable mode of administering its provisions, without either precedent or previous deliberation to guide him.

Unless therefore the law be rendered in itself more easy to administer, any change in the number or character of the

Judges will be of no service in remedying the evils complained of. But, before proceeding to the main subject of the present article, it may be well to consider, in the first place, what possible change of this sort can be put into execution with any prospect of better success; for among all the denunciations which we have heard of the present system of revision, and the reiterated assertions that it must be reformed altogether, we do not recollect that any plan has been suggested as a substitute which is not liable to inconveniences of a much heavier description. To abandon Registration altogether, and return to the old system of prolonged elections, and rights depending on the decision of an assessor, is not, we imagine, in the contemplation of any one. To entrust it wholly to existing local officers is obviously impossible, unless the franchise is greatly simplified. There are, it is admitted, no such officers, to whom the duties now entrusted to Barristers could safely be confided. Whether they can ever be advantageously made part of the business of a permanent local Judge, as they now are in Scotland, will admit of very serious question; but at all events, until local courts are again under the consideration of the Legislature, we may withhold any opinion on the subject. There remains, then, no alternative except the creation of some new court or courts, to replace those which were created by the Reform Act. And inasmuch as critics appear in general agreed that the chief defects of the present tribunal arise out of the number and inexperience of the Judges, it must be supposed that the new bench should consist of fewer functionaries, whose time and talents might be exclusively devoted to the execution of this single duty; as seventy Commissioners were superseded by six, under the last Bankruptcy Act. But it would not be very difficult to show, that, by such a radical change, we should merely be taking refuge from one class of inconveniences in the midst of others, which were foreseen and purposely avoided by the legislature four years ago.

Let us suppose for example (and it is the most feasible scheme which we have yet heard suggested) the appointment of twelve or fourteen permanent Commissioners, with sufficient salaries, to make a circuit once a year for the purpose of performing the duty of revision. We take it for granted, that the

patronage of these appointments must remain in the same hands in which the present patronage is vested, and that the places, as they fall vacant, would be given away by the Judges in rotation. For we should imagine that no reasonable man, of whatever party, would for a moment contemplate the possibility of placing a power so capable of abuse, and so exposed to certain misconstruction, in the hands of any government. No ministry England has lately seen or is likely to see in the present aspect of affairs, would be strong enough, however honest, to disregard party claims, and make such important appointments without fear or favour. These officers must then divide the country into circuits, for the despatch of business. It will be obvious to any one who has watched with attention the proceedings of the last year, whatever allowances they may have made for the intentional protraction of business imputed to Barristers, that these circuits will be of very long duration, and occupy many months. The consequence will be, that the Registration of one county will differ materially in point of date from another. On the occurrence of a general election, some Registers will be a twelvemonth old, while others will be fire-new from the Revising Officer's mint—an inconvenience which will be thought perhaps of little consequence in quiet times, and when parties are pretty stationary; but in the rapid changes and the anxious struggles of the present period, who can fail to see the general discontent and dissatisfaction which such a state of things would produce? It is of no small importance, when Parliament is changed every other year, that there should be some confidence in the country that the new representatives do actually represent the existing state of feeling in the constituencies. With this view, the provisions of the Reform Act for the completion of the Registration throughout the country within six weeks were wisely imagined; and nothing could well be less satisfactory than an arrangement which should mingle within the walls of Parliament the opinions of the past year together with those of the present. But this is a point which we cannot leave in better hands than those of the acute writer of Letters on Registration in the Morning Chronicle of November—no partial friend to the Barristers and their doings. "Each borough and county list," he says, speaking of a proposed system simi-

lar to that which we have mentioned, " would then undergo revision at an arbitrary period, from which intolerable inconvenience and confusion must arise when a general election takes place. There is undoubtedly so much advantage in the cotemporaneous Registration of the whole country, that vast indeed must be the prospect of improvement held out in other respects to authorize the introduction of any system rendering this impossible."

In the next place, although it is true that a small number of Judges may be more likely to agree on the generality of questions submitted to them than a larger number, yet it is no less true that whenever they could not so agree, their difference would be more inveterate, and, as it would soon become generally known, would occasion much greater uncertainty and dissatisfaction. If the Judges were retained always on the same circuits, different bodies of law and practice would be framed in different parts of the kingdom. If they changed their districts, each one, having his own method of proceeding in some points, would annually reverse the rulings of his predecessor throughout a great extent of country. But the first alternative would be almost impracticable on other grounds. The political bias of a Commissioner, becoming a matter of common notoriety, and made the subject of the exaggerations and mis-statements so eagerly circulated respecting all topics connected with elections, would entirely deprive the public in his district of confidence in his decisions. Nor would the matter be much mended by their travelling different circuits in rotation, as each would bring to his new employment the character in public estimation which he had obtained upon his former one. The tendency of Mr. A.'s mind towards a strict construction of the Act, the disposition of Mr. B. to relax it, Mr. C.'s high Conservative principles, and Mr. D.'s Whig partialities, would become matter of ordinary conversation, and any one who has attended our Courts of Revision will know how much this circumstance would tend to inflame the passions and resentments, the mistrust and suspicion, which are engendered in those scenes of political contest.

Observe the angry comments and gross imputations of corrupt motives to which the Assistant-Barristers in Ireland are

perpetually subjected.¹ We do not indeed doubt that, in that country, such imputations would be pretty unscrupulously thrown out by partisans who felt the decisions of any Registration Court press hard against them. The standard of public opinion is not yet sufficiently high on that side of the Channel to render the loose and casual assertions of personal slander against judicial officers as distasteful as they are to our feelings in England. But when we see not only the manner in which the acts of Assistant-Barristers are canvassed, and habitually referred to their supposed political opinions, but the undisguised eagerness with which each party strives to secure every appointment to those offices as an advantage in tactics gained over the adversary, we should surely pause before we determine on subjecting the Revising Officer, in England, to the risk of being held in similar estimation, by investing him with the dangerous attributes of notoriety and permanence in office. It has always been, in our opinion, one of the greatest merits of the English plan of Registration, that the Judges are so selected as to be almost wholly free, as individuals, from the possibility of such odious suspicions. Whatever unpopularity the system may contract falls on the system only; the Barristers are themselves of too little personal importance, their existence is as it were too ephemeral, to render them, individually, marks for public animadversion.

¹ We have refrained from offering any remarks on one of the chief objections urged in ordinary conversation against the system of revision; namely, its supposed expensiveness; because we could only oppose our own conviction, that a less costly one could not easily be devised, against equally strenuous assertions on the other side. But the following comparative view may serve to show that the English system is apparently the least expensive, by far, of those which exist in the United Kingdom. It is taken from data furnished by the Report of the Select Committee on Election Expenses, 1834.

In the counties and boroughs of England and Wales—Voters, 656,337.

Expenses of revision (164 Barristers) in 1832, 30,314*l.*, about 1*s.* 1*d.* per voter.
in 1833, 22,391*l.*, about 9*d.* per voter.

In the counties and boroughs of Scotland—Voters, 64,447.

Revision performed by Sheriff in each } in 1832, 8,479*l.*, about 2*s.* 8*d.* per voter.
county } in 1833, 2,602*l.*, about 10*d.* per voter.

In the counties and boroughs of Ireland—Voters, 92,152.

30 Assistant-Barristers, at 100*l.* each, }
and Deputies paid as in England .. } in 1832, 17,924*l.*, nearly 3*s.* 9*d.* per voter.

We have not been able to ascertain the expense of the following year's Registration in Ireland.

	Page
BIOGRAPHICAL NOTICE OF THE LATE HENRY ROSCOE, ESQ. . .	495
THE BILLS FOR THE AMENDMENT OF THE LAW OF WILLS, OF EXECUTORS AND ADMINISTRATORS, AND OF DEEDS . . .	497
EVENTS OF THE QUARTER.	499
LIST OF NEW PUBLICATIONS	502
INDEX	505

THE LAW MAGAZINE.

ART. I.—REGISTRATION UNDER THE REFORM ACT.

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	Page
BIOGRAPHICAL NOTICE OF THE LATE HENRY ROSCOE, ESQ. . .	495
THE BILLS FOR THE AMENDMENT OF THE LAW OF WILLS, OF EXECUTORS AND ADMINISTRATORS, AND OF DEEDS . . .	497
EVENTS OF THE QUARTER.	499
LIST OF NEW PUBLICATIONS	502
INDEX	505

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steps to be taken by the officers concerned in the preparation of the lists, by the claimants, and by the objectors. All these three subjects, or at least the two last of them, were matters to which the agents, not the Barristers, were to look, if their duties extended to a general superintendence of the Registration in favour of their party. Why, then, were the simplest rules so constantly misinterpreted, and the plainest directions, even those embodied in forms and given in the schedules to the act, neglected? It is no exaggeration to say, that in many counties nearly half the time spent on the revision was employed by the Barrister in rectifying these errors, or in hearing interminable discussions as to their effect on the lists. Notices of objection and notices of claim, for which the schedules appended to the act afforded the most conclusive precedents, were framed with the most provoking disregard of its provisions: when the act pointed out the place where they were to be served, the parties employed to serve them preferred the place most convenient to themselves, or most suitable to their own notions of what was reasonable: when these notices were brought into court, they were brought, in many cases, unaccompanied with that ordinary evidence of service which is matter of routine before every tribunal: in short, the whole preparatory machinery was ill got up and ineffective. It was natural enough, that parties who had nullified their own claims by such default, or general objectors who had the misfortune of seeing the fish for which they dragged slip through the meshes of their capacious nets, should raise or join in the popular cry against the narrow technical construction of the Reform Act by the Barristers. But we have looked as yet in vain, amidst the multiplicity of charges which have been urged against these functionaries, for a single instance in which parties *closely* adhering to its provisions have been unjustly deprived of the benefit of their claims or their objections. Where, then, did the fault lie, if this part of the act was found to work prejudicially to the fair voter? High functionaries and political leaders are, unfortunately, not the only persons in possession of patronage who are tempted to bestow it from motives of favouritism. The associations, too, had zealous friends to reward, or young favourites to encourage: instead of selecting the best men to fight their

battles in these courts, they frequently picked out the incapable or the inexperienced, steady partisans whose only merit consisted in their steadiness, or orators whose only qualification was their fluency: and their affairs were mismanaged accordingly. We make no sweeping assertions. In the course of our own slight observation of the proceedings of these courts, it has sometimes befallen us to see able and acute men, with all the advantage of experience and tactics, arguing with sly submissiveness before some youthful judge, who was endeavouring to conceal his embarrassment by sternly fixing his eye on the pages of a Rogers. But if such exhibitions were not unfrequent, the case was far more commonly reversed: and we believe we might safely assert, that a very large proportion of the injustice and the delay which took place in this years' Registration from questions arising on the preparatory clauses of the act, was owing neither to the Barrister nor to the act itself, nor yet to the ignorance of the unpaid functionaries to whom the execution of some of its provisions is committed, but simply to the negligence of those who had undertaken the office of superintending the Registration.

The experience, therefore, of four circuits has pretty effectually shown that the act, in its present form, cannot be carried into strict execution. Nay, it is our belief, that could it be now ascertained what is the proportion of bad votes on the Registers, or of good votes rejected for informality, the most zealous admirers of the Reform Bill would be staggered at the exhibition of its practical effects. Such a disclosure would betray results almost incredible to Englishmen, accustomed to respect the laws, and to consider, until the contrary has been shown, that whatever is legally done is rightly done. Yet although it will always be impossible wholly to defeat the efforts of ingenuity in abusing legal provisions to serve the bad and molest the good, we think that some simple and easy correctives would go far towards diminishing the evil. It is, however, of the greatest importance to observe, that it is not by legislative interference that this can be wholly done. Nothing can be more unreasonable than the prevailing disposition to recur to the legislature for the solution of every knot which legal acuteness

has tied. The experience of every lawyer will tell him, that new legislation on nice legal questions generally tends, in proverbial phrase, to make more holes than it repairs. Several clauses in the Reform Act undoubtedly require, supplemental enactment to amend or explain them. But it is our conviction that a far greater proportion of those difficulties which have caused a variety of decisions among Barristers, cannot be *definitively* solved at all—that legislation would only make the evil worse—but that it may be materially amended, although it cannot be cured, by the adoption of some mutual agreement among those empowered to put the act in execution: this agreement we hold to be under present circumstances indispensably necessary; and, in entering into some details respecting the practice of these courts, we must request our readers, if otherwise inclined to think them tedious, to bear in mind that the main object for which we have introduced them is to produce, if possible, the same conviction of its necessity.

Two classes of questions generally arise in practice when an act of Parliament containing a variety of details is put into execution: the one class, demanding legislative solution: the other, incapable of it. To the first class belong questions arising on patent ambiguities or errors—on provisions which literally or impliedly contradict each other—and on provisions which it is found impossible actually to enforce, without occasioning much unforeseen hardship. For such difficulties as these, where they appear in our present law of Registration, the necessary remedy will, we trust, speedily be found. A new bill “for more effectual Registration,” was brought in by Lord John Russell early last session: and afterwards passed through a select committee, who gave it much attention, and sought far and near for information and suggestions from the persons best qualified to impart them. But the session passed away, and this bill, with others of nearly equal importance, was postponed for another season. A similar measure will be produced in that which is about to open, and will be urged we hope this time with more vigour and better success. There are very few of its provisions, the expediency of which, after attentively considering them, we are forced to doubt; although

there are some additional ones which we could wish to see incorporated in it. With those points of the Act which it touches we shall give ourselves at present little concern, and merely point out such supplemental amendments as might, perhaps, be advantageously made.

But the other class of questions is far more comprehensive. On the application of every general enactment, numerous and unsuspected distinctions are speedily discovered between the individual objects to which its definitions, terms, or rules are intended to apply: it is in fact the lawyer's trade to discover such distinctions, and the quality which his mind most naturally acquires by the practice of his profession, is that of close and searching discrimination. But where the law is administered by high and authoritative tribunals, the course of precedent supplies a gradual remedy. The vocation of the really great judge is not so much to raise distinctions, as to annul unnecessary differences: to check the advocate's process of divarication: to point out the general principles in which cases agree, rather than the minute particulars in which they vary. Where, on the other hand, fifty tribunals, instead of one, interpret its provisions, without either precedent or court of appeal to direct them, the process of dividing and hair-splitting must, of course, go on with a continually accelerated impulse. To the distinctions taken by advocates must be added, those differences which spontaneously arise between the judges themselves: until, at last, all principle seems to be lost in a mass of contradiction, and the office of the judge is in fact reduced to the task of deciding as equitably as he can, on the supposed merits of each individual case. Now, in the absence both of precedent, and of superintending authority, the only substitute which can be devised—and imperfect we admit it to be—is the adoption of some preliminary resolutions, such as we have recommended: resolutions which, although far from being applicable to every question, might materially narrow the range of debatable points: resolutions to which the adherence of the profession could not indeed be enforced, but might be strenuously advised. Secondly, whenever new tribunals are constituted by an act, a multiplicity of practical questions is sure to arise with respect to the daily conduct of

those tribunals, their rules of evidence, and their regulations of convenience. Here, again, legislative interference would but give rise to additional difficulty : and here, still more than in the former class of questions, mutual agreement might be of essential service.

But such a plan of agreement, even on the best known and most easily accommodable points of difference, seems to be generally pronounced chimerical, and those who are most alive to the defects of the present system, seem most disposed to wait for that remedy which will prove, demonstrably, no remedy at all—explanatory enactment. We will not now stop to inquire by what means such agreement may be brought about : but, in going through the questions of commonest occurrence, we will take such opportunity as any particular instance may afford of pointing out its necessity and its possibility.

Our limits will not allow us to enter, at present, into the subject of the duties committed to overseers and others in preparing the lists, and the necessity of amendment in this part of the Act. The scheme contained in the Bill to which we have referred, which we will not here particularize, appears likely to effect considerable improvement : it is nearly the same with that suggested some time ago by Mr. Elliot, which is printed in the appendix to Cockburn's Questions on Election Law. Copies of the register, forms of notices, instructions, &c., are to be sent to the overseers.¹ But no provision whatever, we are well assured, will enable such persons as rural overseers to execute the duties imposed upon them in such a manner as to stand the test of close examination, to which they must be subjected by litigants in the Revising Barrister's Court. It appears to us, that wherever the Poor Laws' Amendment Act has been put in execution, the fulfilment of that part of the county registrations, which is now

¹ By Lord Stanhope's Registration Act of 1788, which was repealed in the ensuing year, the king's printer was to furnish blank registers for the whole of the parishes : and it was said lately in the House of Commons, that the failure of the scheme was partly owing to Mr. Pitt's disinclination to incur that expense. From that time no plan of registration was proposed until 1827, when a select committee was appointed without any result : Mr. Tierney having given his opinion on that occasion, "that registration was all moonshine."

entrusted to overseers, would be far better committed to the Board of Guardians for every parochial union. That board could be empowered to nominate a committee of its members, to whom the responsibility of preparing the lists should belong : while the actual work would be executed by the clerk to the board, or by the relieving officer of the union : persons in whose selection great care and discretion are now exercised : who are required to possess talent and acuteness, and the nature of whose business renders them necessarily well acquainted with all the localities of their district.¹

In passing to that subject with which we are more immediately concerned, namely, the process of revision itself, a subject consisting almost entirely of a complicated series of minute details, it is difficult at first to lay hold of any general principle which may serve as a clue for its unravelment ; but the following observations may perhaps point out one very general cause of differences between Barristers, and suggest the mode of attaining unanimity :—

When a party appears before the Barrister, in the character of a voter objected to, either in counties or boroughs, it is required that proof shall be given that such person “ was *entitled* on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list.” Where a party appears as a claimant in counties, the Barrister is directed to require proof that such person was *entitled* on that day to be inserted in the list, “ in respect of any lands or tenements within” the parish or township in which he claims. In boroughs, the proof required from a claimant is more general ; that he was *entitled* on the same day “ to have his name inserted in any such list

¹ Although the subject is not strictly within the limits of our present consideration, we cannot refrain from remarking, that if the exaction of the registration shilling is altogether abandoned in boroughs (as is proposed), it is most unjust that the whole expense of forming the register, amounting, throughout the boroughs of England and Wales, to £10,000 a year, should be thrown on the poor's rate. Surely those who are excluded from the franchise because not rated to a sufficient amount, should not be forced to contribute towards defraying the expense attendant on the enjoyment of the franchise by their richer neighbours. We should prefer to retain the shilling and make it to all intents and purposes part of the poor's rate, recoverable by the same process, and demandable as part of the rate levied next before the period of registration.

of voters for any city or borough." (Sections 42, 43, 50.) Now the word "entitled" has received, in practice, two essentially different constructions. Either a party, thus brought before the Barrister, is put immediately and without delay upon the proof of his possessing the franchise required by the Act, that, and that alone, constituting his *title* within the meaning of these sections, with only the additional proof of notice where such proof is expressly required from him by the statute; or he is put, also, upon the proof of certain preliminary acts, which must have been done either by himself or others in order to *entitle* him to be placed on the Register. Upon this construction, the performance by the overseers of the duties assigned to them with literal correctness, the offices of the Clerk of the Peace in counties and the Town-Clerks in boroughs, the payment of the Registration shilling, &c., all form, in effect, part of the right of A. or B. to be inserted on the Register; and many clauses which some hold to be merely directory must be proved to have been literally complied with.

Now it obviously appears, if we have correctly stated this difference of interpretation, that one of two courses lies plainly before the Barrister, either to require proof of nothing which the voter is not required by the Act, *totidem verbis*, to prove; or, to require proof of the compliance of all parties with all the preliminary directions which the Act gives to officers and others. Yet it seems to us that every Barrister with whom we have conferred, or with whose decisions we have become acquainted, has followed neither the one nor the other to its full extent, and that all, without exception, have selected from among the directory clauses of the Act such as they thought most important to insist upon in receiving evidence. None have adopted the extreme laxity of the first course; none have followed to its utmost consequences the rigour of the second. All have, in short, assumed the power of equitable interpretation in construing clauses of a purely technical description; and, if this be so, is it at all wonderful that no uniformity of practice exists in their courts? Thus on no point do the opinions of Barristers seem to vary more essentially than as to the degree of regularity necessary to authenticate a list; nor do they only vary from those of each other, but the

opinions of the same man seem often to fluctuate according to the particular expediency of the case submitted to him. Many, for instance, in counties, receive no lists except such as come from the Clerk of the Peace; while others are content in some cases to take them from the overseers; yet the stricter practitioners seem altogether to disregard the equally imperative directions of the Act, that the lists should be delivered by the Clerk of the Peace "at the opening of the court." We do not pretend to arbitrate between such dissentients; all we contend is, that in no way can the formality or informality of a list come before the Barrister at all, except as such formality may constitute a part of the "title" of a claimant; and if it does, he is as much bound to require proof of all formalities in preliminary matters as of one. Some Barristers there have been who have ventured to push this interpretation nearly to its extreme limits, and have disfranchised whole parishes in counties for the neglect of the overseer to sign the lists:¹ their decision has been much discussed and much animadverted on by lay as well as professional critics, and a gallant military historian, one of the disfranchised, has vented upon them the exuberance of his caustic oratory; yet it has not been shown to our satisfaction that they have done more than carry to their full extent principles which others have adopted in part, although too cautious and, we will add, too discreet, to pursue them to their consequences. For our own parts, our opinion is, we confess, in favour of the more liberal construction; we cannot but think that where the statute has by express language indicated the amount of proof which the Barrister is to require, he is not warranted in extending his inquiries to the performance or non-performance of formalities enjoined by directory clauses only. But, on the present occasion, we do not pretend to offer any solution of questions on

¹ To obviate any such consequences for the future, it should be enacted that the votes already registered in each parish shall stand good until regularly superseded by the new list. It is better to retain a few bad votes on a list than to disfranchise a whole parish, unless indeed the Legislature should be of the same opinion as a Wiltshire Overseer, who, on being told that he had disfranchised his parish by his negligence, replied, "That don't much matter, master; there'll be less ill blood, that's all."—*Edit.*

which so much difference of opinion exists; our only object is to point out, if possible, what the primary difficulties are, out of which all these minor doubts originate, and by so doing to indicate a remedy; for here, we conceive, is a point on which the Barristers are peculiarly competent to decide by agreement among themselves, and to ascertain how much of the Act they will consider as applying to other parties, and which of its provisions they will regard as within their cognizance, so as to require proof of compliance with them as part of the claimant's case.

Analogous to these questions, although not depending entirely upon the same original difference of construction, is one which furnishes a never-failing source of preliminary debate in Courts of Revision; whether service of notice of claim, with due formalities, on overseers in a borough, must be proved before the Revising Barrister, or whether it may be inferred from the appearance of the name in the list of claimants signed and presented by the overseers.¹ This point was gone into at length before the New Sarum Committee of 1833 (1 Cockburn and Rowe, 304), and that Committee decided, that the appearance of the name on the list of claimants was sufficient to prove notice given: Barristers have, we believe, held in general the contrary; but we must here also side with the Committee, as having adopted by far the most reasonable decision; and we cannot but regret that the Select Committee of last sessions, seem disposed to re-enact the provisions of sec. 50 of the Reform Act, on which the ambiguity arises, instead of following the New Sarum decision, and expressly dispensing with all farther proof. It has been, indeed, suggested that such a construction leaves a door open to fraud, by enabling the overseer to insert on the list of claimants persons who have

¹ A similar difficulty arises with respect to the proof of notice of *objection* sent to Overseers; whether, namely, the appearance of the name of the party objected to on the Overseer's list of objections ought or ought not to dispense with the necessity of farther evidence. That it is no small difficulty, may be inferred from the fact that Mr. Rogers, the great initiator of inexperienced youth in the mysteries of the Reform Bill, gives (unless we misunderstand him) contradictory solutions of it in the same page (Law of Elections, p. 105, last edition). We need not add that, if we are right, this is simply one of the errors of haste of which the very able author has accused himself in his preface, and which arise out of the necessary despatch in satisfying the demand for a new edition of so useful a compendium.

never claimed at all; but the charge is surely an absurd one. If the overseer is desirous of inserting bad votes, an opportunity for doing so is afforded but too readily, as he can, if he pleases, put them on the Register, where, if unobjected, they must pass for good, while the pretensions of a claimant are necessarily liable to investigation. It would be much better then, in our opinion, to simplify at once this branch of the enactment by rendering proof of notice of claim in boroughs unnecessary except where the party has been omitted from the list of claimants by the overseers; by which means a source of considerable delay and vexation (unattended, as far as we can discover, by any substantial advantage,) would be cut off. But in the absence of such amendment, it is here also very expedient that Barristers should decide among themselves by which rule they should abide.

We next turn to a very important part of the Act, and one in which no one doubts that much alteration and much explanation are requisite, if it is wished to render it serviceable, instead of being as at present a cause of constant mistakes, frequent chicanery, and occasional collusion; we mean the system of objection. This system, as it is wholly of novel invention in English law, so it is, on its present footing, one of the worst contrived pieces of machinery which ever was put together, and convertible into an engine of great oppression. Nevertheless we are not of the number of those who wish to control the objector's power of doing mischief by throwing every possible obstacle in the way of his success, and watching with superabundant strictness the exercise of his office. The popular cry against frivolous and vexatious objections is easily roused, and has been, we fear, occasionally seconded by those whose office was rather to moderate it; for if it be true that such objections have been liberally made during the excitement of the last registration, it should be remembered that by throwing preliminary obstacles in their way we cripple the only effective opposition which can be made to frivolous claims: and if unfounded objections have produced some hardship and much irritation, unfounded claims have effected a great deal more of substantial mischief.

1. The difficulties which impede the service of notice by

the objector in counties, under the present provisions of the law, are familiar to every one. He is required, by section 39, to "give it" to the party objected to, "to leave it at his place of abode as described in the list," or "personally to deliver it" to the tenant at the premises described as his qualification. It is true that in a vast variety of instances persons, anxious to avail themselves of the power of objecting, have failed entirely through their own default, in wilfully neglecting to attend to these directions. But independent of the doubts which have been raised as to the meaning of the word "give" and "personally deliver," which the Select Committee has by no means removed by a slight verbal alteration, there exists an absolute necessity for amending or rather remodelling this clause altogether. In the first place it is obviously possible, in parliamentary phrase, to drive a carriage and six through the middle of it. The claimant, we know, is not obliged to describe his qualification by inserting the name of the occupying tenant; the address, and that a very general one, will do as well. If, therefore, a claim is sent in the name of A., stating his place of abode at Calcutta, or in some other region where even the speed of steam will not enable the objector to serve him with notice in time, and his qualification, as freehold houses, or land, situate, for instance, in "Oxford Street," or in some exterior suburban district which passes under a general name; we submit that we have thus placed A. in an impregnable position on the register for Middlesex; for we defy the most acute and industrious of objectors, either to serve our man at Calcutta, or to find out his imaginary tenant in Oxford Street, which would be a task almost as difficult as that assigned by a gentleman of consequence to his obsequious friend in one of Theodore Hooke's novels, "to go and find out a man whose name is Smith, and who lives somewhere in Buckinghamshire." There are electioneering purposes which might be served by such an insertion of imaginary votes on the register; nor are we at all prepared to say, that similar tricks have not been put in execution; while personation, every one acquainted with the recent elections must know, is a thing by no means unheard of in our polling booths.¹ In the next place, this sec-

¹ See the evidence before the Southampton Committee, 1 Cockb. and Rowe, 229.

tion of the Act furnishes one of the few real ambiguities which occur throughout the registration clauses. Where the qualification of the party consists in land or houses occupied by several tenants, on which or how many of these is the notice to be served? If on all, the difficulty thrown in the way of the objector is very great; if on any one, the notice may be so served as almost to ensure its never reaching the landlord; it may be delivered to some person unable to read its contents, or, by collusion, to some one who will purposely omit to forward it. To obviate in some degree these and similar inconveniences, it was proposed in the bill of last session that wherever the place of abode of the person objected to as described in the list, is not in the parish to which the list relates, sending by post shall be sufficient service. In our apprehension, this provision ought to be extended to all county objections whatever, although we rather suppose that the Select Committee, by limiting the privilege of sending by post to this description of cases, intended to protect the lower class of yeomen, &c., whose qualification and place of abode are generally the same, and to whom letters sent by post arrive only on rare occasions, after a considerable period of purgatorial suspense in the window of the village post-office. But it is surely better that such laches should operate to prejudice the voter, than that the power of objecting should be subjected to so much question and dispute, and the country saddled with the annual expense of its litigation. And after all, the transmission by post will yet leave one existing absurdity unrectified. A party on a county register is obliged, in consequence of the clause at the end of sect. 37, to send in a fresh claim every time he changes his residence. His neglecting to do so is a fair ground of objection. He is then placed under this hardship; that the objector is only bound by the Act to serve notice on him at his residence as described in the list, which, *ex hypothesi*, is not his residence now. This, however, may be thought a matter of such slight consequence as scarcely to deserve a remedy.

It is, we confess, exceedingly questionable to us, whether, when the machinery of registration is a little better understood, it may not become practicable to dispense with direct notice of

objection to the voter altogether in counties as well as in boroughs. And we are greatly tempted to propose that if any notice at all is given, it should be through the medium of the clerk of the peace, who, on receiving these notices by a certain day, should publish, once for all, the names of all persons objected to, parish by parish, in the county paper having the largest circulation: whereupon any individual therein named might satisfy himself, by inspection of the overseer's list of objections, whether he was the party intended. But we fear that such a suggestion would not meet with much favour in the present day: for the people of this country are not yet fully aware of the use which might and ought to be made of the public press for the purpose of conveying public notice to individuals.¹

A much more brief and effectual mode of removing, in a great majority of cases, the inconvenience attending the proof of notices of objection was, indeed, proposed by the framers of the bill of last session; namely, that the appearance of the objectee by himself or another should waive such proof altogether. This clause was struck out by the Committee, and no enactment of similar nature substituted for it. Certainly there would be great hardship in requiring a party, who has received a notice of objection which he has every reason to think insufficient, a mere hoax, perhaps, or a piece of vulgar annoyance, to run the risk of losing his vote if he do not appear to answer to it. Yet, on the other hand, there are strong grounds of public convenience in favour of the plan.

2. Other questions relating to the formalities of objections are numerous, and the variety of decisions respecting them has occasioned no small astonishment; but all appear to have the same origin, in the uncertainty how far the Barrister may dispense with the strict letter of the sections and schedules of the Act. Notices of objection, signed by the objector in blank, and filled up by other parties, have been held good by some, bad by others; while not a few, rejoicing in the discovery of that middle course which offers so enticing a refuge to timid

¹ It would be better of course that name, place of abode and qualification, should be published as in the overseer's list; but if so, no paper would suffice to contain a full list of county objections. A sheet of the Times will hold 14,000 names.

Judges, hold them good "if recognised by the objector," a doctrine, which of course lets in a delightful variety of evidence and argument. The point is of no great importance, but it is one of those which, we repeat, might be speedily and satisfactorily settled by agreement among Barristers. Whether notices of objection without the addition of the objector's address, &c., &c., are sufficient? In our opinion, it would be best literally to adhere in these matters to the form given in the schedule, notwithstanding the vexatious words, "or to the like effect," with which Sir Charles Wetherell, their introducer, has perplexed this portion of the Act, believing that as soon as this strict practice became generally notorious, little or no hardship would result from it. Another point which it is absolutely incumbent on the collective wisdom of Barristers to decide, is the authority required to constitute an agent for an objector, claimant, &c. We should hold it best that a party, to appear on behalf of an objector, should have a written authority; that one appearing for a claimant or an objectee (who may be presumed a mere *simplex persona*) should not be required to show any authority at all. But, as is the case with a hundred other discretionary points, it is of comparatively little consequence how these questions are decided, provided some uniform rule of practice be adopted.

3. It is almost unnecessary to state, that we anticipate considerable advantage from a clause which will, no doubt, form a part of whatever act is passed for the amendment of registration, as it does of the bill of last year: namely, to empower the Barrister to give costs in case of frivolous objections, or, which is still more important, in case of claims without reasonable or probable cause. To this it was proposed to add a power to fine high-constables, overseers, &c., for neglect of duty. Our only fear is, lest the good of such salutary clauses should be too often defeated by the reluctance of the Judge to face the unpopularity and occasional clamour which would be created by their enforcement. A single case will shew, as well as a thousand, the nature of the benefit to be derived from such provisions against objectors. It is that of vexatious inquiries as to the incumbrances on the property of a freeholder. We should, indeed, for our own parts, be willing enough to see all such

incumbrances throughout the country made public by means of a general register; but such publicity as this is widely different from the partial and distorted publicity which is attained when a freeholder, whose interest, after all such charges, is undoubtedly sufficient to entitle him to a vote, is compelled to gratify private or party spite by exposing the state of his debts and family arrangements at the will of a malicious neighbour; by whom, not unfrequently, the threats of such an exposure have been used with a view to deter the freeholder from appearing to claim his franchise.¹ Such a practice is among the worst nuisances engendered by political animosity and promoted by imprudent legislation; and in no case would the infliction of costs give a more effectual remedy; for it is our belief that, although the pecuniary amount of such costs could not but be small, the shame of such an adjudication and the fear of doing injury to their own party by incurring it, would with most objectors be a powerful means of repression.

From another recommendation usually coupled with the last, and which has been introduced with it into the bill of last session, we are by no means equally confident in expecting good results: viz., that objectors should be required to state the grounds of their objections in their notice. It appears to us that this enactment must produce one of two effects: either it will operate to discourage those searching objections which are made for the purpose of detecting fraudulent registrations: for how can an objector tell on what particular ground to attack a name of which he never heard before, and which he believes to have been inserted without any probable cause at all? Or, which is more likely, the objector will be compelled, in a great number, if not the majority of instances, to include in his notice all the grounds of objection which his ingenuity can frame: and thus revert in substance to the former practice.

¹ In small boroughs, enjoying the benefit of a scot and lot or pot-walloping suffrage, where it was not possible to ascertain which way many of the poorer electors would vote until they came to the poll, briefs for counsel to argue before the assessor have sometimes been delivered in the following alternative shape:—"A. B. *If for us*, a respectable man, a carpenter by trade, with a large family; has lived three years in — Lane. To prove this, call —. *If against us*, a vagabond, not known in the town; was seen walking in last Friday, with his pot on his back, To prove this, call —." The same principle is still acted upon occasionally.

But then, it is said, the Barrister will have the power of awarding costs for unsupported grounds of objection. Such an award would in the first place be unjust, where a general objection has been made for the purpose of ascertaining the real character of the claim, which cannot be done in any other way: and, in the next place, almost always ineffectual, because the costs which he awards cannot exceed the reasonable expenses incurred by the objectee. Such expenses must in general amount only to the value of his own time, and his actual disbursements in attending the court, which he must equally have suffered if objected to on a single ground or on twenty, and which he could not, therefore, recover if any one of the objector's grounds was reasonable.

Lastly, in discussing projects of amendment in our system of Parliamentary Registration, it becomes a most important question whether the decision of the Barrister on the facts submitted to him should not be final and conclusive: whether a party who has been once objected to, and once retained on the list, ought not to be free from any future molestation, so long as he retains the qualification in respect of which he has once been registered, except before an Election Committee. The framers of the proposed measure of last year suggested a clause to this effect: but it was struck out by the Select Committee among their other amendments, jealous, doubtless, of the facility which might thus be afforded for tampering with the Register. For it is evident that an agent, unless he were very closely watched, might place on the list a number of fictitious votes, raise against them fictitious objections, and, on the dismissal of these objections by the Barrister, his men of straw would remain good and sufficient voters for the rest of their lives, unless disfranchised by an Election Committee. Yet on the other hand, it seems demanded by common justice, that if certainty cannot be introduced into this branch of the law, some provision should be made to protect the unfortunate sufferers from its uncertainty. We could cite the case of an inhabitant of a borough, who has now been four times brought before the Revising Barrister by objection—twice he has been inserted on the list, and twice expunged, and always on the same evidence!

Perhaps some means may yet be devised of obviating the

vexation without incurring the risk. If the objector is confined to the grounds of objection stated in his notice, and the objection is dismissed, the Barrister might then be required to furnish the voter with a certificate, stating the nature of the objection and its dismissal; and such certificate should be conclusive against the same objection being ever raised again, the voter's qualification not having been in the mean time altered.

Before closing our observations on these preliminary matters, we must notice one or two great difficulties which arise, partly out of the insufficiency, and partly out of the indefinite nature of the powers of the Revising Barrister. It is, in the first place, absolutely necessary that this officer should be able to compel the attendance of claimants or objectees where he may deem it necessary: and this is afforded him by a clause in the new bill, which gives him general authority to enforce witnesses by subpoena. But he should also possess a power, under proper limitations, of procuring the production of documents. We might adduce numerous instances of the failure of the court to administer justice from the absence of these powers, of which one or two may suffice. In the metropolitan districts very numerous objections were taken to parties this year, on the suspicion (well-founded in most cases) of their being aliens. The Barristers, we believe, unanimously decided that the proof of personal incapacity lay on the objector: and we apprehend rightly, although it is undoubtedly a question of some nicety. How, then, was this proof to be effected? Some few of the parties were caught, and convicted of alienship by cross-examination: but by far the greater number were better advised, and kept away. Under such circumstances the proof of their not being British subjects became the proof of a negative, which is proverbially impossible. Scarcely any of these objections, therefore, succeeded, except where the objector could give evidence of some admission which he had dexterously drawn from the claimant when off his guard: and a very great number of bad votes is retained, at the present moment, on the lists of the metropolitan boroughs, from this circumstance alone.¹

¹ In these cases the inspection of the books at the Alien Office was refused; on what grounds, we do not know.

A still more remarkable instance, shewing the imperfection of the Barrister's powers, has been recently reported: we take it from a provincial newspaper only, and therefore omit names and places, as some facts may have been misrepresented, although the main circumstances are obviously correct. It occurred on the recent revision of Burgess Lists, for the performance of which the Barristers had nearly the same powers conferred on them with those given to the same officers by the Reform Bill. A considerable number of inhabitants, who were likewise freemen, in a corporate town, were believed by the opposite party to be in the receipt of loans without payment of interest, from a fund appropriated by the founder to the purpose of making such loans to indigent freemen. This, it was supposed, was such a receipt of public charity as would invalidate their votes. The question was, how to prove the fact. The first one or two freemen on the list, unsuspecting of the nature of the objection to be raised against them, were caught, and the requisite evidence was elicited from their own mouths: the rest, rendered more wary by the fate of their companions, remained outside the door and within actual hearing, as it was alleged, of the proceeding, while they empowered a disinterested friend to appear in their behalf. The Barristers decided that they could not compel their attendance. One more chance remained for the objector. He called on the town-clerk to produce the list of debtors to the charity from the books of the corporation. But the town clerk refused—acting, as he said, under the direction of the municipal officers of the town, who would not suffer their secrets to be disclosed. Should they, who had, perhaps, “sent bootless back” a king’s commissioner, armed with all the terrors of his extraordinary authority, produce their state papers at the bidding of so paltry a functionary as a Revising Barrister? The objections, therefore, were abandoned for lack of evidence, and the cases subtracted from the Barrister’s cognizance altogether.

With respect to the *indefinite nature* of the Barrister’s powers, the chief difficulty is that which arises on a clause of the much-debated 50th section, which enacts, that “where the christian name, or the place of abode, or the nature of

the qualification, or the local description of the property of any person who shall be included in any such list, shall be wholly omitted in such list, in any case where the same is by this act directed to be specified therein, such Barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted be supplied to the satisfaction of such Barrister before he shall have completed the Revision of such list, *in which case he shall then and there insert the same in such list.*" It is obvious, that under a literal construction of this section, a Barrister's power would very nearly extend to an entire making of the Register. If nothing more appeared on the list than a man's surname, without a syllable appended to it, the Barrister, on the omitted matter being supplied, is empowered, nay, directed to supply the whole: and thus the intention of the legislature in making the lists public might be entirely frustrated. Barristers have, therefore, shrunk from acting up to the full extent of their authority: each has determined, according to his own view of the case, to consider particular defects as amendable or fatal: some have supplied almost every omission, others scarcely any: and if conflict of decisions and uncertainty of law have arisen from this circumstance, it is surely the legislature and not the judges who ought to bear the blame. But this is one of the cases in which, we think, an agreement among the Barristers as to the interpretation to be put on the clause in question, would facilitate matters much more than legislative interference.

We have thus gone through, as far as our limits will permit, most of the still undecided questions which occur on the registration clauses of the Reform Act, and most of the practical inconveniences or absurdities arising from their provisions. It is impossible for us, on the present occasion, to examine at similar length the remainder of our subject, and point out the ambiguities both of common and statute law, with respect to the franchise itself, with which Revising Barristers have to deal. Such an investigation may be, perhaps, reserved for another opportunity. We can only now observe, that here also a distinction may be accurately pointed out between cases requiring the interference of the legislature, and

those which only need a common understanding among Barristers to solve them. Of the latter class of cases the following may serve as examples. 1. In the borough franchise, it must be left to the Barristers to determine what, if any, is a sufficient constructive rating. The most ingenious attempts at precision in defining it, on the part of the legislature, would evidently be met by still greater ingenuity in drawing distinctions: but an agreement such as that which we have proposed,¹ might materially diminish the number of these questions by narrowing their range, pointing out some common forms of rating as sufficient, and others as insufficient, while at present there prevails the most unlimited license of decision on the subject. 2. Again, the definition of sufficient payment of rates and taxes (should these conditions of the franchise be eventually retained) cannot well be made the subject of enactment. 3. Further, the meaning of terms, such as "holding," "occupation," "residence," must finally be left to the good sense of the judges, whoever they may be, assisted by such precedent as the analogy of the Poor Laws, &c., can afford: to fix it by act is impossible without raising more difficulties than would be removed. But this is one of the subjects on which a little more clearness and uniformity of apprehension among those judges than at present exists, is obviously desirable. There are, it may be said, three species of definitions with which lawyers have to do: the first legal, fixed by statute or clear precedent: the second popular, expressing the ordinary meaning of a word: and a third, which may be termed analogical, i. e. a definition by which a general term is made to comprehend not only all that the public understand by that term, but also every thing which falls within the same species, having what logicians would term the same difference or specific property: everything, in short, which answers in some leading points to the same description. Thus the word "shop,"² has a tolerably clear meaning in common

¹ It should always be remembered that by converting a rule or maxim into an enactment, you let in verbal commentary, and destroy the flexibility of the rule. An agreement to abide by a given rule or maxim, can have no such consequence. From this distinction a strong argument against what is called codification may be deduced.—*Edit.*

² "When a word is used in legislation that is neither technical nor explained in

parlance: but analogically, every place in which a man buys, or sells, or transacts his professional business, is a "shop:" an attorneys office is a shop: a livery stable is a shop: and we have heard much ingenuity displayed in the endeavour to prove, that where the legislature says shop, it means all these places into the bargain. While such wide difference prevails as to the meaning of common words, it becomes most urgently necessary that men should confer a little with each other's understanding, and submit their own personal opinions to the general apprehension which prevails among a majority of their fellows.

There remains, in the last place, a long list of questions respecting the franchise, as to which the interference of Parliament is required, and the agreement of Barristers, according to our original distinction, could do nothing. Some of these questions arise on clear mistakes in the words of the Reform Act: others on ambiguities which could not well have been detected until practical experience had brought them to light. A good many of these are disposed of, and we think satisfactorily, in the bill of last session. In counties, it is proposed that the £50 occupation shall not necessarily be under one landlord: and that most prolific source of sublime argument and elaborate judgments, the discrepancy between the two sections of the Reform Act respecting the rights of trustees, will be, we trust, effectually stopped, by rejecting the first and retaining the second of these irreconcilable clauses. Were we disposed to find fault with the present system of revision, and join the ranks of its numerous adversaries, we could find no single text to dwell on with so much satisfaction as this. That which is obviously and undeniably an oversight occasioned by the insertion of two different clauses from two old acts of Parliament (a consequence of the bad practice now prevalent of getting up government bills by several independent hands, as rail-roads are commenced by breaking ground on

the law, it must of course be understood according to the signification it has in common parlance."—(*Livingstone's Introductory Report to Code of Crimes and Punishments*.) Definitions commonly beg the whole question, and etymology leads to endless confusion: what, for instance, would become of the term *sycophant*, were we to resort to original derivation? As for holding *shop* to include *office* or *livery-stable*—by precisely the same mode of reasoning, *table* might be shown to include *sideboard*, and *sofa* to include *chair*.—*Edit.*

different parts of the line at the same time) has occasioned more solemn and lengthened discussion, and engendered more diurnal fees to the judges, than any single question in the act besides. But want of space compels us to pass over this topic; we will only show, that it seems by no means certain that the new provision will effect its object. Should the present bill pass, the law will then declare, that no trustee shall enjoy the franchise, unless he receives the rents and profits "to his own use." Were the matter *res integra*, this would be clear enough. But when so many Barristers, in their endeavour to reconcile the jarring clauses, have sought out meanings unheard of before, for the old-fashioned words "to his own use," rendering "use" by "control," or "disposition," and thus drawing nearly all active trusts whatever within the limits of the franchise, we fear that some of these gentlemen, for the sake of consistency, will be tempted to repeat their old interpretation.¹ In the borough franchise, the questions which have arisen on the meaning of the words, "or other building," will be pretty effectually set at rest by the enactment, that such building shall be of the separate value of five pounds: and the question, whether a number of buildings may be rated under one occupation, superseded by an enactment in the affirmative.

Lastly, there are a few plain errors and ambiguities which the bill of last year has still omitted to remedy: one only shall be mentioned here. It is necessary that it should be ascertained, for what purpose, if any, the last day of registration (31st July) is now to be taken as the day of election.

This is a question which the new bill will render rather more complicated than before, unless some additional clauses be introduced. In consequence of the conflicting decisions of the Rochester, Bedford, and other committees respecting their right to enter into questions not raised before the Barrister, this bill defines that right to extend to cases in which a cause of personal incapacity has "arisen" between the 31st of July and the election.² Thus the principle is clearly recognized, that the 31st of July is *not*, for all purposes, equivalent to the

¹ The word *Trustee* has been defined in the last section of the Poor Law Amendment Act, but doubts have arisen notwithstanding.—*Edit.*

² Thus removing the serious difficulties which have arisen on old statutes disa-

day of the election, as some had before been disposed to hold it. Therefore, in the first place, it becomes necessary to decide, at what period an annuity must be registered in order to confer a vote under the provisions of 3 Geo. III. c. 24, which requires such registration to take place twelve months before the election. If, for instance, "before the election" does not mean "before the 31st of July" the act is virtually repealed: inasmuch as no one can take cognizance, either at the poll or before a committee, of the time when such registration took place. This should be remedied by a special clause, and, in favour of the franchise, the registration should be only required to have taken place six or ten months before the last day of July, as it is uncertain how long after the first of the following November the election may take place on that registry. (See Rogers, last Edit., p. 143; Shepherd, last Edit., p. 19.)

We have been compelled, on the present occasion, to pass very rapidly over some of the most important parts of our subject. Many of our questions may be thought ill-selected, many of our solutions defective, while the experience of every one conversant in this department of law will suggest to him plenty of cases which, in his judgment, require alteration or explanation, which we have altogether omitted. But our end is attained, if we have satisfied our readers that in the event of the present tribunal being retained (and we have given strong reasons against the adoption of any other in its place), the uncertainties and confusion which have hitherto attended the administration of the act may be materially lessened, in part by legislative interposition, in part by the adoption of some rules of agreement among the barristers themselves. To this latter point we would earnestly endeavour to direct the attention of the profession. We shall be told, that a similar attempt was made before the first revision in 1832, and that it failed completely. But it must be remembered, that the subject was then a new one; and it is impossible for the most practised sagacity to foresee the questions which will arise on an act not yet put in execution.

bling persons who have been appointed to certain offices, &c. from voting at an election which should occur within a stated time after their appointment.—See New Windsor case, 1 Knapp and Ombler.

Four years of experiment have now, we believe, sufficed to bring forth all the difficulties of any consequence which are likely to arise: they can now be classed, and reduced in number by striking out mere multiplications of the same question in different forms: a little industry might suffice to draw out a list of them in plain and precise language; and it would then be practicable enough to frame rules for the guidance of all those who might be disposed voluntarily to accept them, which, although they could not apply with decisive force to each individual case, might materially narrow the range of questions open to litigation.

Nor will we suffer ourselves to be deterred by a false delicacy from suggesting another reason, which renders such unanimity at the present moment especially desirable. It is above all things necessary that the barristers' courts should maintain that high character which they now possess, of being inaccessible to political corruption and free from all undue bias. It is not by the exclusion from the office of revising barrister of persons holding strong political opinions, or who have ventured to use strong language in expressing them, that this character is to be preserved. On the contrary, the judges, by disregarding the common cry against the appointment of such persons raised in party newspapers, or in those cautious circles of society in which it is the tone to shrink from every bold and uncompromising assertion of public sentiments, have done themselves honour and the profession no more than justice. From the moment that such a rule of exclusion is adopted, a premium is given to hypocritical circumspection, and to apathetic mediocrity: and, moreover, a sort of suspicion is thrown by the high authority of the bench on the honesty of the bar, when it is supposed that political bias will prevent any of its members, if otherwise known as men of honour and integrity, from doing their judicial duties uprightly. Assuredly, at the bar, as everywhere else, the men of the most decided tone and temper are not among the least capable; and those appointments which have been the most cavilled at on this account have furnished some of the ablest functionaries, whose decisions have given most general satisfaction. But in defending the revising barristers, without exception as far as

we have heard, from the charge of wilful perversion of justice in the cases brought before them, we cannot forget or dissemble the fact, that political sentiments do inevitably, in many cases, give a particular colouring to the view which men take of the act and its provisions. There is no doubt, that upon the comparative strictness with which the machinery of the registration clauses is controlled by the barrister, the comparative strength of the two great parties which divide the empire may in many instances depend. "The closer the register the better for the conservative," was the avowal, rather too forcibly uttered, of a speaker on that side at a recent political dinner; and such is, unquestionably, the fact. Leaving all imputations of fraud out of the question, the liberal party are in general the worst supplied with money, and therefore their registration is less accurately attended to: and any general disfranchisement on account of neglect or informality is more likely to tell against them than their adversaries; their partizans, also, comprehend a larger proportion of the lower classes, against whom a stricter interpretation of the other conditions of the franchise is more likely to have an excluding operation.¹ Knowing, as we do, the imperceptible manner in which political prejudice insinuates itself into the feelings even of the most upright and honourable men, it by no means surprises us, therefore, that barristers of strong conservative opinions seem in general more inclined to take the stricter view in those many clauses which have been made the subjects of a close and a loose interpretation, and that greater laxity of construction is usually to be

¹ On the other hand, the period of the year during which the revision takes place is against the higher classes (at least in London) as most of them are then absent from their homes. To any one personally acquainted with the bar, the bare notion of their suffering political motives to have any direct influence on their decisions—of their ever dreaming for a single moment of sacrificing their characters as lawyers to gain a petty insignificant advantage for their party—is ridiculous. There may be, here and there, a crack-brained enthusiast who would do this; but the thoughts of the immense majority are fixed exclusively on the best mode of getting on in their profession, and they feel that the best mode is to show themselves possessed of sound judgment and accurate legal knowledge on every occasion that may be afforded them. Knowing, as we cannot but know, a good deal about the habits of young lawyers' minds, we think it no great exaggeration to say that nineteen out of twenty would not surrender the chance of a brief to prevent Lord Melbourne or Sir Robert Peel from being hanged to-morrow.—*Edit.*

found among those of opposite sentiments. There are, undoubtedly, plenty of exceptions to so general an assertion; we shall, perhaps, be deemed by many illiberal, and accused of pandering to the vulgar taste for misrepresentation, for hazarding it at all; but it is, nevertheless, our decided impression that such is the fact; and, whether it be so or no, it is pretty generally suspected. This alone is reason enough to render highly desirable the adoption of some fixed principles which may diminish the amount of cases on which this difference of judgment can operate.

But in order to facilitate this result, and in order to render the present system of appointment in other respects less liable to objection, it appears to us that a few plain suggestions may be made available. We will not enter into any discussion respecting the hands to which this patronage should be entrusted; but presume that it is given, as at present, to the Senior Judge of Assize on every circuit. In the first place, then, we should strongly recommend that the nomination should take place earlier in the year. It is true that the Act absolutely requires that the appointment should be made on the Summer Circuit; and this should be amended; but, in default of such amendment, it appears to us that the Judges might, without contravening its provisions, effect the alteration which we propose by an arrangement among themselves. The Judge on the Spring Circuit should undertake the virtual execution of the office, and, immediately before or after that circuit, notify to each Barrister his intended appointment: which appointment must be filled up in point of form, and any necessary substitutions made, by the Judge on the Summer Circuit. By appointing after the circuit, one rather imaginary cause of fear would be avoided, which persons of highly scrupulous virtue professed to contemplate when the Registration clauses were under discussion in Parliament; viz., that Barristers might feel themselves in some degree dependent on the favour of an individual before whom they might be immediately called upon, as advocates, to exercise the functions requiring full independence of mind for their due fulfilment. The Barristers, also, being thus rendered sure of their destination, would be able to make such preliminary arrangements as we have ventured earnestly to

recommend for the purpose of securing unanimity. This would be at present impossible; for although a Revising Barrister of last year might feel himself pretty secure of re-appointment in this, a feeling of delicacy would prevent him from acting as if he expected it to take place, by taking part in any such scheme for the regulation of his conduct in his contingent occupation.¹ Secondly, the number of appointments may be advantageously diminished, although not to any very great extent, both in order to give the Judges the power of selecting fewer and abler men, and to diminish expense. It is certain that very exaggerated apprehensions were entertained, when the Reform Bill was in debate, as to the number of functionaries who would be required to execute this part of its provisions. The opponents of the measure always calculated that three hundred Revisers would be, to use Sir Edward Sugden's expressions, let loose upon the country; nor were they contradicted by its supporters. The actual number employed in England and Wales was 165 in 1832, and, we believe, a somewhat smaller number since. Nevertheless, the list is still susceptible of reduction. The period of revision might also be advantageously extended as far as the first of November or commencement of Michaelmas Term. It must be remembered, that if, by simplifying the preparatory process of the Registration, something is gained in point of time, yet on the other hand some of those provisions which are most loudly called for, both by expediency and public opinion, such as those which empower Barristers to award costs and to fine inferior functionaries, will have the effect of lengthening proceedings in a still greater proportion. Whether there be any limitation adopted with respect to the age of the Barrister, does not appear to us a matter of essential consequence; no standing will secure ability, and no period which can be fixed upon without going so high as to leave too small a choice among those willing to take the appointment, will exclude absolute inexperience, considering how many members of the bar are amateurs.

Such are a few of the regulations which might, we think, be successfully adopted to promote, if not to secure, the great

¹ The numerous changes made annually, without any reason, known or to be divined, must prevent such expectations from being confidently entertained.—*Edit.*

objects of uniformity of practice and capacity in the Judges, under the system of revision as it stands. But we are not so weak as to imagine that these or any other devices will be fully effectual, either to reconcile the public mind to the decisions of such unknown and unpractised officers as many of them in every year must inevitably be, or to insure their acting in concert and on intelligible and consistent principles. Among all the admirers of local courts, few have been hardy enough to propose that they should adjudicate in the last resort both on fact and law; and yet such is the authority entrusted by the Reform Act to the youngest and least experienced set of judges in the empire. Surely it is rating the value of the parliamentary franchise at a very low estimate to suppose that parties will be content to allow their rights to depend, irrevocably, on the judgment of so imperfect a tribunal. For as to Election Committees, even could the "wild justice" which they now administer be rendered more complete and more satisfactory than it has ever hitherto been, it is sufficient for our purpose to remark, that they do not constitute a court of appeal for the individual who has been aggrieved by a wrong decision, but for a whole body of voters, or for a candidate, who may think it worth while to try the whole of the Barrister's decisions over again. Unless his party take up his cause, the injured claimant has no remedy whatever. There must therefore, we confidently submit—on the grounds of justice as well as of expediency—on the dearest principles of the constitution as well as for the benefit of the subject—be some mode of appeal from the decision of Revising Barristers, or of any other tribunal, whether local or itinerant, which may in process of time be substituted for theirs.

This is a result to which the reasonings of all who have considered the subject have inevitably led them; but all have shrunk from a conclusion which seemed to involve an expense and an amount of litigation truly terrifying. A great Central Court of Revision, with all its machinery of Judges and inferior officers, and with the enormous charges attending on an examination of witnesses and a trial of facts at so great a distance from the scene of action, seems a charge far too heavy to lay on the country in addition to all those with which recent law reforms have saddled it. It is too ponderous an en-

gine to apply to a matter which involves, or ought to involve, so little of difficulty and complication as the electoral franchise. But were the institution of such a court a thing in itself desirable, it must be observed that its inevitable consequence would be an interference with the jurisdiction of Election Committees. That jurisdiction is an essential privilege of the House of Commons, with which it most assuredly will not part as long as it retains the temper which has characterized it in modern times. Nor are we certain, however paradoxical the doubt may be deemed by many, that any advantageous substitute could be found for that jurisdiction, were we prepared to innovate so largely on the constitution. How, for example, could we constitute a court with sufficient materiel to go through such investigations as the scrutinies of the last session? Our own persuasion is, that much as the composition of Committees may need reform at present, they will, when they have undergone the requisite amendment, be recognised as by far the most efficient tribunals for the re-consideration of evidence heard before the Revising Barristers.¹

But it appears to us quite practicable to separate that evidence, and the questions of fact resulting out of it, from the questions of law to which it may give origin. On these principles we cannot but think it possible to establish a judicature, which, without encroaching at all on the powers of election committees, would indirectly relieve them in great measure of that part of their labours for which they are most obviously unfitted. The facts which appear in evidence before revising barristers, admit as easily of being distinguished from the law which assigns a value to those facts, as in any other species of judicial proceedings, although, as happens in courts of quarter sessions, which exercise a very similar judicature in trying appeals against rates and orders, the two are apt to get strangely confounded together in the imperfect discrimination of inexperienced judges. The principal defects of the revising barristers have been analogous to those observable in magistrates when acting in those courts. They have shown, not so much a want of judgment in scrutinizing facts and estimating the value of evidence, as a want of that power, which knowledge and practice alone can give, of comprehending how a

¹ This must be regarded as the individual opinion of the writer.—*Edit.*

legal principle, drawn by way of precedent from one class of facts, can be applied with accurate analogy to another. Their decisions have sometimes evinced ignorance of law itself, but more frequently that negligence of its strict rules which so commonly accompanies inexperience in administering them; for an unlearned judge is constantly on the search after some imaginary equity, and rarely gets out of the circle of the case before him. In our view, therefore, the same corrective ought to be applied to the errors of the barrister which is successfully applied to those of the magistrate. We should not (unless it were proved, which we do not expect, that some additional hands would be absolutely necessary,) require the creation of a single new judge or new officer. The Judges of Westminster Hall are, after all, the only functionaries to whom the public looks with thorough trustfulness: and this reliance seems daily on the increase, as the multifarious changes which have recently taken place in the character of other tribunals and the functions of other magistrates deprive them of prescriptive respect and its accompanying confidence. We cannot but think that the diminished amount of business which is now committed to an increased number of superior judges, (local tribunals having taken out of the hands of the fifteen so much of the employment for which twelve were wont to suffice,) would allow of their bestowing, without prejudice to themselves or to their higher duties, all the slight amount of labour which our plan might require. Our suggestion is, that claimants or objectors dissatisfied with the decision of a barrister should be at liberty to apply for a case on the point of law, which it must be discretionary in him to grant. The case must be drawn with consent of parties, and submitted to him for approval before the termination of his circuit; and should be sent up forthwith to Westminster in the ensuing Michaelmas Term. We do not profess to be able to conjecture what actual amount of litigation would be thus created, but it is our impression that, even at first, it would not be large. As far as our own experience has enabled us to form an opinion, the instances in which parties have honestly believed the barristers guilty of legal misdecision, have been comparatively few indeed; and if the defeated party's perseverance arose only out of chicane or obstinacy, it would suit his purpose better to fight the battle over again at the next registration. For the despatch of these

cases in London, a court might be instituted composed of three puisne judges; or of two, with liberty to call in a third in case of disagreement. Their sittings should be at the same period with the *nisi prius* sittings after Michaelmas Term; and if the business before them could not be disposed of within that period, fresh judges might take the residue after Easter Term. In order that claimants or objectors might be as little prejudiced as possible by the delay, the clerk of the peace in counties, and the town-clerk in boroughs, should be furnished, immediately on the decision of each case, with notice to strike out or to insert the name in his own Register, which must of course in counties, should an election take place pending the sittings, serve to this extent as a correction of the printed register: an inconvenience which would not be great, as the number of names so circumstanced would not probably be very large. When all the cases are disposed of, the results should be embodied by the clerk of the peace, in counties, in the shape of a supplemental list, to form part of the register.

We need hardly add that the mass of law which would gradually be created by the decisions of judges on cases thus brought before them, would form a highly valuable manual, not merely to the revising barrister or other revising officer, but also to election committees. It could not, perhaps, be enacted, without incurring some inconvenience, that the decisions of the judges should be actually binding on those committees in similar cases; and there might be, at first, among the latter, some independent spirits who would not readily submit to the trammels of a foreign authority, even on abstract points of law. But the gradual influence which a steady, uniform, competent tribunal must exercise over one of a fluctuating character, with which it possesses concurrent jurisdiction, will ensure it final supremacy, and the will of the partisan will ultimately bend to the wisdom of the judge. Lastly, such a court would afford to the voter a cheap, expeditious and satisfactory mode of trying his right; a mode which would offer no undue encouragement to litigation, would silence all complaint and satisfy all doubts, and would raise the importance of the franchise in public estimation, by rendering it the subject of a distinct series of authoritative precedents.

Mr. Shepherd's treatise, named at the head of this article, is, we believe, the only book on Election Law on which we have never yet passed an opinion. The reason is, it was originally published before the passing of the Reform Bill, and the present edition is the first in which the provisions of that bill have been incorporated. The work has long been considered one of the very best on the old law, and has evidently furnished many valuable suggestions to subsequent writers. In its present improved state, it constitutes a complete summary of the Law of Elections, including the result of the decisions down to the period of publication; and being written in a clear perspicuous style, with a thorough knowledge of all the bearings of the subject, bids fair to throw all other commentators on the Reform Bill (with the exception of Mr. Rogers) into the shade.

M.

ART. II.—LIFE OF LORD CHANCELLOR TALBOT.

THE uneventful life of this accomplished lawyer and most estimable man, scarcely otherwise marked than by the successive steps of his elevation in the profession he adorned, and by his advance in the esteem of all good men, however admirable the example it supplies for the imitation of the legal student, must be admitted to furnish little of incident or amusement to the reader of biography. But our catalogue of distinguished lawyers would be indeed imperfect, if *his* name were omitted, who perhaps above them all, by a rare union of the highest professional acquirements with the calm and dignified exercise of virtues almost unblemished even by frailty or error, commanded the universal reverence of his country while he lived, and her deep and abiding regret when a premature death removed him from the sphere of his honours and his usefulness. So few, however, are the recorded *facts* of his life, that our brief sketch will necessarily wear the appearance rather of a panegyric than a biography.

William Talbot, a gentleman of some fortune in Staffordshire, descended from a younger branch of the ancient and

renowned house whose fame some centuries before had resounded throughout Europe, was the father of an only son, William, who entered the church, and through the interest of his kinsman, the well known Charles Talbot, Duke of Shrewsbury, became successively Dean of Worcester, Bishop of Oxford, and Bishop of Salisbury, until, in the year 1722, he settled on the summit of clerical advancement, in the princely dignities of Durham. By his second wife, Catharine, the daughter of a Mr. King, an alderman of London, he had eight sons, and several daughters. Of those who lived to maturity, the eldest was Charles, the subject of this memoir. He was born in the year 1684, his father being then the incumbent of an Oxfordshire living, and having gone through the usual course of preparatory study, and acquired more than the usual substratum of classical knowledge, was entered, in Michaelmas term 1701, a gentleman commoner of Oriel College, Oxford. There also, as well as at school, he distinguished himself by his successful application to the prescribed studies; and having, in right of his rank as the son of a bishop, proceeded to his bachelor's degree at the end of three years' residence, was almost immediately afterwards (November, 1704,) elected to a fellowship of All Souls' College; for which the statutory qualification is to be "bene natus, bene vestitus, et moderate in arte cantandi doctus." His original purpose had been to take orders; and it is said to have been by the earnest advice and request of Lord Chancellor Cowper, and not without some reluctance and apprehension, that this destination was abandoned, and he applied himself to the study of the law. Having however made his final choice of a profession, he at once entered zealously on the acquisition of the knowledge necessary to its successful prosecution; and even during his undergraduateship, legal reading formed a regular head of his studies. He was entered of the Inner Temple on the 28th of June, 1707, and on the 11th of February, 1710-1, was called to the bar by that society. In the same year he vacated his fellowship by marrying Cecil, daughter and heiress of Charles Matthews, esq. of Castle Mynach, in Glamorganshire, and great-granddaughter by the mother's side of the celebrated Welch judge,

David Jenkins, whose zeal and sacrifices in behalf of the royalist cause were so conspicuous in the great rebellion, and who made so gallant a resistance to the despotic tyranny of *privilege*. From him she inherited, and conveyed to her husband, the estate of Hensol, in the same county, from which he afterwards took the title of his barony. Supported by his talents and assiduity, and aided by the countenance of his patron, and the influence of his illustrious connexions, he advanced rapidly in professional estimation, and grew, after a very few years, (and before he received any legal rank) into leading practice in the equity courts, to which he had from the first devoted himself. His professional industry was, indeed, taxed to support an expense not less unusual than it was, in this instance, unbecoming. The splendid revenues of the see of Durham were insufficient to maintain the profuse and magnificent expenditure of his father, the bishop, even though, to the great injury of his popularity and his usefulness, he increased them considerably by advancing the fines on the renewal of leases held under the see; and his son was compelled, on two several occasions, to apply large sums to the satisfaction of his debts. In the first parliament of George the First's reign, Mr. Talbot had been elected for Tregony, and sat for that borough until 1722; at the general election in that year he was returned for Durham City, his father having just then been advanced to the bishopric. On the death of the Solicitor General, Sir Clement Wearg, in April, 1726, he was appointed to succeed him; and on that occasion, as also at the general election which followed in 1728, he was re-elected for Durham, and retained that seat until his elevation to the woolsack. His parliamentary duties were probably made subordinate to his professional; at all events, hardly a record survives, beyond the testimony of general panegyric, to show that he escaped the common fate of eminent lawyers within the walls of St. Stephen's. Yet he appears early to have attained some standing with his party; since he was selected in 1722 to second the re-election of Sir Spencer Compton to the speakership, the mover being Lord Stanhope, afterwards the celebrated Earl of Chesterfield. We believe there are but one or two other occasions on which he is mentioned in the collections of the Parliamentary History

as a speaker in either house.¹ Nor was the reign of George II., until the occurrence of the disastrous rising of 1745, a period in which the law officers of the crown found occupation, or could acquire distinction, in the conduct of important state prosecutions. Mr. Talbot (he had not received the rank of knighthood with his patent of Solicitor General,) appears in the State Trials only on the occasion of the prosecutions directed by the Gaol Committee of the House of Commons, in 1729, against the keepers of the Fleet and other prisons, for the murder of prisoners in their custody by confinement in cold and pestilential cells: and also on the trials of one Hales for extensive forgeries, in the same year. The great arena of his learning and talents was the Court of Chancery, where himself and the no less eminent Attorney General, Yorke,—*magis pares quam similes*,—divided almost the whole business of the court, and even (if an anecdote we quoted in a former memoir may be credited,) at times stood in the place of the court itself. So extensive a practice, and so acknowledged a reputation, could not fail, independently of his claims as one of the law officers of the government, and of those derived from his high personal estimation and unblemished character, to recommend him as pre-eminently fitted for advancement even to the highest judicial rank. By the contemporary events of the resignation of Lord Chancellor King and the death of Lord Raymond,² the two chief prizes of the profession fell at the same time to the disposal of the minister. The general expectation was, that according to the usual routine of

¹ In the year 1736, although then Chancellor, he strongly opposed, in conjunction with Lord Hardwicke, some severe clauses of a bill for the repression of smuggling; but his speech is not reported. The protest of the dissentient peers on that occasion stated, as one of its main grounds of justification, that "as two noble and learned lords, who presided in the two greatest courts in the kingdom, had shown by the strongest arguments that the bill, as it stood, might be dangerous to the liberty of their fellow subjects, they (the lords) could not agree to the passing of it, however expedient or necessary it might be supposed in other respects." Mr. Hallam cites this as a remarkable proof of the rigorous restraints imposed by our fiscal code upon the personal liberty of the subject, which could create such alarm in the "not very susceptible" mind of a regularly bred crown lawyer, and one always disposed to hold very high the authority of government.

² Lord Raymond died in the Hilary vacation of 1733; Lord King did not resign until the following October; but the chief justiceship was not filled up in the interval, probably in expectation of the latter event.

promotion, the great seal would be transferred to Sir Philip Yorke, and the post of chief justice given to Talbot. But as the duties of the former had withdrawn him more from that exclusive attendance on the courts of equity to which the latter had devoted himself, although both were equally qualified to occupy the bench of the Court of Chancery, yet the Attorney General was more perfectly fitted to discharge the more varied duties belonging to the presidency of a common law court. There was indeed some small difficulty on a subject which lay pretty close to Sir Philip's heart,—the respective *incomes* of the two offices; but this was satisfactorily obviated by an increase of the salary of chief justice from two to four thousand a year, by the assurance of a peerage, and by the consideration of the much less precarious tenure of the latter post;—for Sir Robert Walpole was already exposed to the assaults of an unrelenting and formidable opposition: Yorke, therefore, took his seat in the King's Bench, and entered the House of Peers as Baron Hardwicke; Talbot, with the unanimous assent and applause of the profession, received the Great Seal, and with it the dignity of the peerage, by the title of Lord Talbot, Baron of Heusol. His patent bears date Dec. 5th, 1733. On this elevation he resigned the office of Chancellor of the diocese of Oxford, which had been given him by his father when bishop of that see, with the view of his resigning it in favour of his younger brother Edward, had not the bishop been removed to Salisbury before the latter became qualified for the office. It was on the occasion of Lord Talbot's taking leave of the Society of the Inner Temple as a bencher, upon his advancement to the Chancellorship, that the last of those solemn *revels*, which were wont of old to grace the halls of the Inns of Court, and whereon the venerable Dugdale dilates with such a grave complacency, was celebrated in the Inner Temple Hall. We cannot refrain from paying our humble tribute to the memory of these departed scenes of "exquisite fooling," by transferring to our pages the narrative of this, the last of them, as we find it specially recorded in the notes to Wynne's *Eunomus*. Alas! all things are become new:—not even the dignified solemnities which erst accompanied the investiture of the coif, not even the venerable ceremonial of *counting*, has now escaped the

ruthless edge of innovation ; the very purple robes, in which the learned personages we speak of still rejoice to involve themselves, ere long, we fear, will have faded from our view, or hang the empty mementos of departed honours, at length to all intents and purposes

“ hoc inane purpuræ decus ! ”

But our regrets must not be suffered to detain us from our history.

“ On the 2d of February, 1733-4,” says the historian, who evidently writes *con amore* of the inspiring subject, “ the Lord Chancellor came into the Inner Temple Hall, about two of the clock, preceded by the Master of the Revels, Mr. Wollaston, and followed by the Master of the Temple (Dr. Sherlock, Bishop of Bangor),—[what a truly canonical and episcopal exercitation !]—and by the judges and serjeants who had been members of that house. There was a very elegant dinner provided for them and the Lord Chancellor’s officers ; but the barristers and students of the house had no other dinner provided for them than what is usual on *grand days* ; but each mess had a flask of *claret*, [the times have sadly degenerated in this respect], *besides* the common allowance of port and sack. Fourteen students waited at the bench-table, among whom was Mr. Talbot, the Chancellor’s eldest son, and by their means any sort of provision was easily obtained from the upper table by those at the rest. A large gallery was built over the screen, and was filled with ladies, who came, for the most part, a considerable time before the dinner began ; and the music was played in the little gallery, at the upper end of the hall, and played all dinner-time.

“ As soon as dinner was ended the play began, which was *Love for Love*, with the farce of the *Devil to Pay*. The actors who performed in them all came from the Haymarket in chairs, ready dressed ; and, as it was said, refused any gratuity for their trouble, looking upon the honour of distinguishing themselves on this occasion as sufficient.¹ After the play, the Lord Chancellor, Master of the Temple, judges and

¹ We learn from one of the public journals of the day that the praise of this extraordinary disinterestedness was hardly deserved :—“ the societies of the Temple were pleased to present £50 to the comedians.” The same authority reports, that “ the ancient ceremony of the judges, &c. dancing round the coal fire, was performed with great decency.”

benchers, entered into their parliament-chamber, and in about half an hour afterwards came into the hall again, and a large ring was formed round the fire-place (but no fire or embers were on it). Then the Master of the Revels, who went first, took the Lord Chancellor by the right hand, and he, with his left, took Mr. Justice Page, who, joined to the other judges, serjeants, and benchers present, danced, or rather walked, '*round about the coal fire*,' according to the old ceremony, three times, during which they were aided in the figure of the dance by Mr. George Cooke, the prothonotary, then of sixty; and all the time of the dance, the ancient song, accompanied with music, was sung by one Toby Aston, dressed in a bargown, whose father had been formerly Master of the Plea Office in the King's Bench.

"When this was over, the ladies came down from the gallery, went into the parliament-chamber, and stayed about a quarter of an hour, while the hall was being put in order; then they went into the hall, and danced a few minutes [minuets.]. Country dances began at ten, and at twelve a very fine collation was provided for the whole company, from which they returned to dancing, which they continued as long as they pleased; and the whole day's entertainment was generally thought to be very genteelly and liberally conducted. The Prince of Wales honoured the performance with his company part of the time; he came into the music *incog.* about the middle of the play, and went away as soon as the farce of walking round the coal fire was over."

After all, we fear this final "farce" was but a cold and degenerate resemblance of its predecessors in Dugdale's time.

The Chancellor, introduced with such august ceremonies into his office, administered its duties in such a manner as to give the most unqualified satisfaction to the practitioners, the suitors, and the country. Eminently learned and experienced in the principles and practice of equity, dignified, courteous, temperate, diligent, with intellectual powers as clear and discriminating as his mind was unprejudiced and his integrity unassailable, he appeared to unite in himself all the qualifications necessary to the formation of a perfect equity judge. The immediate consequence of his appointment was a great increase of business in his court,

which, nevertheless, his learning and diligence combined to keep under, with much smaller arrears than in the time of his predecessor, inefficient no less from his broken health than from his want of those qualifications for his office which nothing but a course of practice at the equity bar can effectually supply, at least to any but the highest order of intellectual superiority. His demeanour on the bench is described in the highest terms of praise by his contemporary eulogists. "In his hearing of the bar, all gentlemen there were equally treated; none could be said to have the ear of the Court; neither rank nor personal acquaintance with his Lordship gave the counsel or his clients any advantage in the making of the decree or order, or in the countenance of the Court at the time of delivering the argument." Sensible that the judicial duties of his office in the Court of Chancery and on the woolsack were sufficient to engage all the powers and demand all the energies of a single mind, and being at the same time of a temperament little disposed to extreme opinions in politics, he did not seek to occupy a prominent position either at the council-table, or in the ministerial conduct of the House over which he presided. "The Chancery," says another more enthusiastic encomiast, "was his province; he had the eloquence of a Cowper, the learning of a Somers, and an integrity peculiarly his own. He had patience in hearing, readiness in apprehending, judgment in discerning, and courage in decreeing." His decisions are reported in the volume known by the title of "*Cases tempore Talbot*," collected by Mr. Forrester, a practitioner of repute at the equity bar. They exhibit, indeed, in the form in which we have them, little of the eloquence so highly rated above, which the reporters of that day, devoted entirely to the illustration of the legal doctrines of the cases, would perhaps have deemed an incongruous and impertinent superfluity; but they display a strong and ready grasp of facts, a thorough intimacy with legal principles and authorities, and an eminently clear and logical exposition of them: his judgments being invariably accompanied by a statement, more or less in detail, of the reasons upon which they were grounded. They retain an authority almost untouched by the dissent of later judges.

Great as was the satisfaction with which the elevation of

Lord Talbot was generally regarded, we find that there was one person, and that one of no inconsiderable note, who saw his advancement, and viewed his public conduct, with a dislike and suspicion for which it is difficult to account, except on the supposition of some personal favour refused, or *job* suppressed. This was the old Duchess of Marlborough, whose restless and virulent spirit—

“From loveless youth to unrespected age,
No passion gratified, except her rage,”—

still found its most congenial food in the strife and personality of politics. Perhaps, as a member of Walpole's cabinet, he was involved as of course in the bitter hostility she waged against the minister himself. We suspect she found reason before long to abate the admiration with which, as it appears from one of the paragraphs we are about to quote, Lord Hardwicke—not yet the dispenser of patronage—had inspired her. In a letter to Lord Marchmont, of the date of June 1734, she writes (referring to the complaints of corrupt interference in the election of Scotch peers)—“There will be vast numbers of petitions in the House of Commons of the same sort in the elections of this country as has been practised in yours; and one against my Lord Chancellor, who has done most unbecoming and unjustifiable things to make a return for his son against Mr. Mansell for Glamorganshire. This is a step very bad to begin his reign with; but it is certain he is a man of no judgment, whatever knowledge he may have in the law; nor does he know anything of the world or the qualities of a gentleman.” In a letter a few months later in date, she entertains her noble correspondent with the following narrative: “I had an account lately, which I will write, because I do not think it is printed, that my Lord Chief Justice Hardwicke has got great credit in his circuit to Norwich. There was a Yarmouth man in the interest of Sir Edmund Bacon, who, upon pretence of a riot at the entry of the courtiers, the mayor ordered to be whipped. This man brought his action, and my Lord Hardwicke said it was very illegal and arbitrary, and directed the jury to find for him, which they did, *and gave damages*, though the foreman of the jury had married a daughter of

Sir Charles Turner, who I take to be a near relation of Sir Robert's. I do not think this made the poor man amends, who was whipped wrongfully; for I would have had those that occasioned the whipping doubly whipt themselves. But I suppose the judge could go no further; and I liked it, because my Lord Hardwicke is a great man; and I hope from this action, as well as from his independency, that he will have some regard to the proceedings in Scotland when represented: but remember, that I prophesy, that the man that is one step above him will have no regard but to his present interest. I know the man perfectly well." From another letter in the same collection (the Marchmont Papers) we learn that towards the latter end of the same year, 1734, a rumour prevailed that the Chancellor had taken "extreme disgust" at some conduct of the ministers, who were stated to have used him so ill that a man of honour and spirit could not brook it. Whatever was the cause of this dissension, of which we find no hint elsewhere, it was by some means repaired before it widened into an avowed breach. Possessing at once the confidence of the sovereign and the good opinion of the nation, he could not, indeed, easily have been made the victim of ministerial jealousy or cabal.¹ He continued in the occupation of his high office and the assiduous discharge of its duties, and had, as we are assured, almost matured his plans for an extensive and efficient reform of the imperfections and abuses of the equitable jurisdiction,² when a sudden and premature death hurried him, after an illness of only five days, from the scene of his laborious and honourable exertions. His constitution, always delicate, had suffered much from the fatigue he had encountered in the despatch of the business of his Court; and though the immediate cause of his death was an attack of inflammation on the lungs, it was found, on his body being opened by Mr. Chesel-

¹ It is stated in the *Biographia*, "that it was generally said, that had the Chancellor lived a little longer, he would have had the lead in the ministry;" and the writer in the *Craftsman* hints at a similar expectation: "Under the influence of such a man, we had reason to hope for a complete coalition of parties, or at least for a re-union of such as wish well to their country." It is impossible to ascertain what truth there was in these surmises.

² This probably means no more than that he was a leading member of the Commission which had then been for some years prosecuting its inquiries on this subject, and which made a Report in 1740.

den, that a polypus of considerable extent adhered to his heart, which must of course have proved mortal after no long period of time. He resigned himself to death with the calmness and composure derived from a long course of sincere religious observance, and expired, the subject of universal regret, at his house in Lincoln's Inn Fields, on the 14th of February, 1736-7, not having yet completed his fifty-second year. The last official act of his life was the affixing his signature to the *cong   d'elire* for the elevation of Dr. Potter to the primacy, on the evening but one before he died. His remains were conveyed to his seat of Barrington, in Gloucestershire, and deposited in a vault under the chancel of that church.

The public organs of both political parties united in encomiums on his virtues and lamentations for his loss. The *Craftsman*, which, under the auspices of Pulteney and Bolingbroke, was conducted in a spirit of unrelenting and systematic hostility to Sir Robert Walpole's government, vied with the ministerial press in its praises and regrets; although even a more unequivocal sign of the general esteem with which he had been regarded is afforded by the fact, that during the continuance of his life and power, when the publications of both parties teemed with lampoon and scurrility the Chancellor (so far as we have been able to discover) does not appear to have been made the subject of a single personal attack. The forbearance of political enemies to a living minister is even a higher testimony than their praise of him when dead. "He is a single instance," says the writer in the *Craftsman*, "that real worth and integrity will not go unrewarded, even in this degenerate age, as far as the affections, and almost the veneration of the people, may be looked upon as any reward. Whig and Tory, court and country, men of all parties and persuasions, unite on this occasion, and vie with each other who shall do most justice to the memory of so extraordinary a person."

Of the personal appearance and deportment of Lord Talbot we are told no more than that they were dignified and prepossessing. We have seen no picture of him; but Houbraken's print, in Dr. Birch's collection, represents him, we believe faithfully, as of a spare countenance, dark complexioned, with

a grave and thoughtful but mild and pleasing expression of features. Pope, classing him in the list of the early patrons of his poetical attempts, designates him "the courtly Talbot," referring, doubtless, to the high-bred polish of his manners, which might possibly contract a little of the stateliness of official communication. As little are we admitted into the familiarities of his private life, or enabled to depict the individual shades of taste, temper, habit, or demeanour, the portraiture of which gives to biography all its personality, and by much the greater portion of its interest. However eminent the subject of the narrative, however splendid or useful his career, however admirable the lesson his life may furnish, we demand the more that we shall be admitted to see and converse with him, not only in the court suit and ruffles of the statesman or the robe and ermine of the judge, but also in the easy undress of in-door and familiar intercourse. Yet one of the writers we have already quoted, and who professes to speak from personal acquaintance, gives us a delightful, although a general, picture of the domestic life, the "household virtues," of this admirable nobleman. "His religion was his governing principle; it was well founded and active; his piety was rational and manly. He was a sincere son of the church of England, and ready to maintain her in her just rights and legal possessions; he was an enemy to persecution, and had a diffusive, general, and Christian charity, which made him a friend to all mankind. He was a careful and indulgent father; and as no man ever deserved more of his children, no man could be more affectionately beloved by them: there was something so peculiar in this respect, that none seemed to know how to live in such friendship with his sons as my Lord Chancellor. The harmony which subsisted in his house was a very great pleasure to all who beheld it; like the precious ointment to which the Psalmist compares such a union, it was not only an ornament to the superior parts, but 'ran down to the skirts of his clothing;' it was visible among all his domestics. His servants were united in an affection for their lord, and a friendship for one another; they were restrained in their duty, not by any rash or rigorous commands, but by a certain regard to decency and order that reigned throughout the family; every one was so easy in his situation, that he was

insensible of his dependence, and was treated rather as an humble friend."

The most pleasing part also of Thomson's elaborate poem on his patron's death, is that in which he refers to the graces of his domestic character:—

"Still let me view him in the pleasing light
Of private life, where pomp forgets to glare,
And where the plain unguarded soul is seen.
Not only there most amiable, best,
But with that truest greatness he appeared,
Which thinks not of appearing; humbly veiled
In the soft graces of the friendly scene,
Inspiring social confidence and ease.
Say ye, his sons, his dear remains, with whom
The father laid superfluous state aside,
Yet swelled your filial duty thence the more,
With friendship swelled it, with esteem, with love
Beyond the ties of blood, oh! speak the joy,
The pure serene, the cheerful wisdom mild,
The virtuous spirit, which his vacant hours,
In semblance of amusement, through the breast
Infused. * * * •

I too remember well that mental bowl,
Which round his table flowed. The serious there
Mixed with the sportive, with the learn'd the plain;
Mirth softened wisdom, candour tempered mirth,
And wit its honey lent, without the sting."

Lord Talbot did not forget the duties in respect of knowledge and literature, which his high and influential station imposed on him. He extended a liberal patronage to literary men, in a spirit of generous good breeding which honoured him without degrading them. The poet Thomson, who was recommended to him by his early friend Dr. Rundle, was first employed in the capacity of travelling tutor to his eldest son, with whom he visited most of the continental courts; and was afterwards comfortably installed in the place of Secretary of Briefs, which he might doubtless have retained for life, had he not been too proud or too indolent to solicit a fresh gift of it from Lord Hardwicke when he succeeded to the chancellorship. The poet warmly extols the delicacy of that patronage to which he was himself so much indebted:—

"Unlike the sons of vanity, that, veiled
Beneath the patron's prostituted name,

Dare sacrifice a worthy man to pride,
And flush confusion o'er an honest cheek;
Obliged when he obliged, it seem'd a debt
Which he to merit, to the public paid."

He made it his business to assist at least with his purse, and (so far as he had the power to consult his own wishes) with the patronage in his gift, the most meritorious and exemplary of the clergy, with less regard to considerations of personal or political preference than the holder of the Great Seal has often adventured to indulge. Stackhouse, the learned and excellent author of the History of the Bible, having published 'proposals for printing his theological works by subscription, was invited to dinner by the Chancellor, who, after subscribing liberally himself, recommended the work so warmly to his professional friends round the table that they could not do other than follow his example, so that the worthy divine returned home with about a hundred guineas in his pocket, - a fair beginning of his subscription. Lord Talbot indeed would deserve well of the Christian world, if it were only on the score of his having put in the way of promotion, and therefore of more extensive usefulness, the pious, learned, and excellent Bishop Butler. This admirable person, who was the son of a small tradesman at Wantage in Berkshire, had been solemnly recommended by a younger brother of the Chancellor, to whom he had casually become known, to Bishop Talbot, from whom he received first the rectory of Houghton-le-Skerne in Durham, and afterwards the valuable living of Stanhope. Lord Talbot, on becoming chancellor, named Butler as his chaplain; and by his influence he obtained also a prebendal stall at Rochester, and the appointment of clerk of the closet to Queen Caroline, the sure introduction to episcopal honours. It was while he occupied this post that he published his celebrated Analogy.

In one case, indeed, which made no little noise at the time, the Chancellor incurred considerable censure in regard to the disposal of a bishopric. Even before he attained the wool-sack, he had strongly solicited preferment for his father's friend and his own, Dr. Rundle. The see of Gloucester became vacant a few months after he received the seals, and so warmly did he interest himself in the doctor's behalf, that the *congé d'elire* for his advancement to the

bishopric was issued and gazetted, the election took place, and nothing remained to be completed but the consecration, when objections were suddenly interposed to the appointment, on the ground of the alleged heterodoxy of Rundle's religious opinions, by several of the bishops, more particularly Gibson, Bishop of London. A controversy of no small bitterness ensued between the partisans of the disputants; the Chancellor, however, after contesting the matter for some time with his right reverend opponents, was obliged to yield, and the doctor was consoled with the richer mitre of Derry, which became vacant about the same time; the same character, as one of the angry pamphleteers remarked, being deemed good enough to minister to the spiritual interests of an Irish diocese, which was proscribed as unfit to preside over an English one. Dr. Rundle, many years afterwards, made a splendid acknowledgment of the debt of gratitude he owed his patron's memory, by bequeathing to his son a legacy of 25,000*l*. The Chancellor's general beneficence was warm, comprehensive, and unostentatious. His seat at Barrington was at once the scene of a liberal and rational hospitality, and the centre of a diffusive and well-regulated charity. After his death, a long list of persons, the regular pensionaries of his private bounty, was found among his papers.

By his lady, already mentioned, whom he lost so early as the year 1720, Lord Talbot had five sons: Charles, who died unmarried in 1733; William, who succeeded him in the title, and was created an Earl in 1761; John, who went to the bar, sat in Parliament successively for Brecknock and Ilchester, and became puisne justice of the Chester Circuit; Edward, who died an infant; and George, an exemplary and pious clergyman, who preferred the quiet exercise of his duties on a retired Gloucestershire living to the see of St. David's, which was offered to him in 1761. The second Lord Talbot went into warm opposition to Sir Robert Walpole's administration, and gained considerable repute as a spirited and fluent parliamentary speaker. One of his speeches, in particular, in which he opposed with much vehemence Lord Hardwicke's proposition for extending the penalties of treason, denounced against those who should hold correspondence with the family of the Pretender, to the corruption of blood in the descendants of the offender, may be instanced as a piece of vigorous and

effective declamation. Horace Walpole describes him as "a lord of good parts, only that they had rather more bias to extravagance than sense," and as a sworn enemy to the Chancellor (Hardwicke) on the score of some family jealousies.

Lord Talbot's younger brother, Edward, whom we have before passingly mentioned, a clergyman of great worth and talents, died in the year 1720, at the age of twenty-nine, being then Archdeacon of Berks, and having filled also the honourable appointment of preacher at the Rolls. He recommended to the patronage of his father, with his dying breath, three of his clerical friends, who all well justified the preference of his friendship, and every one of whom, although then unbeneficed, found that recommendation the first step towards a mitre: Secker, afterwards primate; Benson, who became bishop of Gloucester, (both of them raised to the bench in 1734, doubtless through the good offices of the Chancellor); and Bishop Butler. His posthumous daughter and only child, Miss Catherine Talbot, acquired considerable celebrity in the literary world for her talents and accomplishments, and was one of the contributors to the *Athenian Letters*, and a frequent writer in the periodical publications of her time. His widow survived him for the remarkable period of sixty-three years, dying in the year 1784, at the great age of ninety-five.

We will conclude this short and necessarily very imperfect sketch by a few extracts from a well-expressed summary of the merits and character of Lord Talbot, which we find in a contemporary publication,¹ probably from the pen of Dr. Birch, to whom he was personally well known:

"It is a maxim generally received, and generally true, that difficult and unquiet times form those great characters in life which we view with admiration and esteem. But the noble lord to whose merit we endeavour to pay this acknowledgment obtained the honour and reverence of his country at a season when no foreign or domestic occurrence occasioned any remarkable event. Therefore, as *facts* cannot be related, from which the reader may himself collect a just idea of this amiable and almost unequalled man, *words* must faintly describe those extraordinary qualities which combined to complete his character; and though future generations may imagine those virtues heightened beyond their true proportion,

¹ The "General Dictionary," (1739).

it is a suspicion not to be apprehended from the present age. . . . In apprehension he so far exceeded the common rank of men, that he saw by a kind of intuition the strength or imperfection of any argument ; and so penetrating was his sagacity, that the most intricate and perplexing mazes of the law could never so involve and darken the truth as to conceal it from his discernment. As a member of each House of Parliament, no man ever had a higher deference paid to his abilities, or more confidence placed in his public spirit ; and so excellent was his temper, and so candid his disposition in debate, that he never offended those whose arguments he opposed. . . . As no servile expedients raised him to power, his country knew he would use none to support him in it. When he could gain a short interval from business, the formalities of his station were thrown aside ; his table was a scene where wisdom and science shone, enlivened with elegance and wit. There was joined the utmost freedom of dispute with the highest good-breeding, and the vivacity of mirth with the primitive simplicity of manners. When he had leisure for exercise, he delighted in field sports ; and even in those trifles showed that he was formed to excel in whatever he engaged in ;¹ and had he indulged himself more in them, especially at a time when he found his health unequal to the excessive fatigues of his post, the nation might not yet have deplored a loss it could ill sustain. Though removed at a time of life when others but begin to shine, he might justly be said *satis et ad vitam et ad gloriam vixisse* ; and his death united in one general concern a nation which scarce ever unanimously agreed in any other particular."

The maxim is assuredly no longer true, that

" Men's evil manners live in brass ; their virtues

We write in water :"

the office of modern biography is more frequently to engrave the tablets of its heroes with such a crowd of excellencies, that no room remains for the exhibition of their frailties. Lord Talbot was even more fortunate ; for his failings appear to have been almost as much forgotten during his life as his virtues were extolled over his tomb.

W.

¹ This, it must be admitted, is rather a superlative manner of saying that a man was a good shot.

ART. III.—THE DOCTRINE OF LIEN.

THE doctrine of lien is one of such extensive application to matters decided in Courts of justice, that it has necessarily entered into a great number of legal treatises. It has been particularly discussed in Mr. Powell's and Mr. Coote's works on mortgages, and in Lord Tenterden's work on shipping, and has formed the exclusive subject of two treatises, one by Mr. Whitaker, which appeared in 1812, and another by Mr. Montagu, published in 1821. Mr. Whitaker's work is confined to that kind of lien which gave rise to the general doctrine: to that kind which he defines to be "the right which one person in certain cases possesses of detaining property placed in his possession belonging to another, until some demand, which the former has, be satisfied."¹ In the course of his work he shows how this lien may be acquired and how lost, when it is general, and when particular; and then gives instances of the classes of persons who may acquire it, and of the classes of subjects in which it may be acquired. This, however, is not the kind of lien which gives rise to the greatest number of difficulties, and to which we now request the attention of our readers. We wish to give a general view of that lien which one person has upon goods held by another, to refer to the general principles upon which it appears to have been founded, to explain when it is lost, and to support the view which we take of the subject by adding in some detail the principal cases in which the rules upon it have been determined.

The ancient species of lien of which Mr. Whitaker treats appear to be formed upon principles of equity rather than of law. A person sends his coat to be mended and brings trover to recover it. Strict legal principles would seem to require that the tailor should be compelled to surrender it, and should have his remedy for the labour which he has applied to it, by an action of assumpsit. But the Court of law allows him to retain the coat as a pledge for his repayment. It acts upon the same principles as a Court of equity, when that Court requires a plaintiff to do equity to the defendant, before it compels the defendant to do equity to him: thus the Court of law

¹ Whitaker on Lien, p. 2.

compels the owner of the coat to pay his debt to the tailor, before the tailor is compelled to return the coat. This is lien properly so called.¹ "The word in its proper sense in the law of England," says Lord Tenterden, "imports that the party is in possession of the thing which he claims to detain. Where there is no possession, actual or constructive, there can be no lien." In this last sentence Lord Tenterden must have intended to give either a very extensive meaning to the word "constructive" or a very narrow meaning to the word "lien." Either he meant by "constructive possession," not merely a possession by a servant, but also a possession as it were by agreement, by the existence of some understanding that one person shall hold property in trust for another; or else he meant by "lien" that legal kind of lien, which is confined to the thing actually possessed by the person who claims it or by his servant.

To establish the lien of the more extended nature, two things must be proved: first, privity of person, secondly, privity of person in respect of the particular subject matter. Where either one or the other privity cannot be proved, there is no lien. If it is uncertain what is the subject matter of lien, as if the subject matter has been sold and the proceeds have been mixed with other property, or if it was not in esse at the time when the agreement was made or must be supposed to have been made, in any of these cases privity as to the subject matter will be wanting. On the other hand, if the person who has the subject matter in possession has in no way either directly or by implication rendered himself liable to the person who claims the lien, or has purchased the subject matter for a good consideration and without notice, there is no privity of person. When we come to examine the cases, we shall find that upon either of these suppositions there can be no lien, and that the difficulty throughout all the cases has been to determine the circumstances in which either or both of these two privities should be recognized or denied.

The ground upon which these two kinds of lien have been adopted is precisely the same, namely, to give confidence to individuals in their dealings with one another. The workman commences the work which he has been requested to do

¹ Abbott on Shipping, 5th ed. p. 171.

with a perfect assurance that he may retain it in his hands until he has been paid for his labour. Landowners dispose of their land, and merchants of their merchandize, in the confidence that, although in the hands of others, it will remain a pledge for the money which they have a right to claim; and thus in different ways the existence of a lien is an encouragement to enterprize and commercial intercourse.

Although the terms legal lien and equitable lien are frequently employed, we do not think that the distinctions between them can be very strictly defined, because in many instances a lien which appears to be founded upon principles altogether equitable has been enforced in Courts of law. For where A. parts with the possession of his goods, and B. receives them, and by receiving them is understood to put himself under a certain obligation to A., and is compelled to fulfil it in a Court of law; the Court seems to be entering into considerations which are altogether of an equitable character; the *assumpsit* is not expressed, and except upon a general consideration of all the circumstances cannot be implied. "There are to be sure," says Sir W. Grant, in *Gladstone v. Birley*, "liens which exist only in equity, and of which equity alone can take cognizance; but it cannot be contended that lien for freight is one of them. As to liens on goods of one man in the possession of another, I know of no difference between the rules of decision in Courts of law and in Courts of equity. The question that so frequently occurs whether a tradesman has a lien on the goods in his hands for the general balance due to him, or only for so much as relates to the particular goods, is decided in both Courts in the same way and on the same grounds. To extend the lien, the party claiming it must show an agreement to that effect, or something from which an agreement may be inferred, or a general usage of the trade. Lien, in its proper sense, is a right which the law gives; but it is usual to speak of lien by contract, though that be more in the nature of an agreement for a pledge." It is precisely this lien by contract which is recognized both in Courts of law and also in Courts of equity. If the contract is express, there can be no reason why it should not be enforced like any other contract in a Court of law; but if it is implied it would seem according to the general

principles of the two Courts to fall exclusively within equitable jurisdiction.

The question naturally suggests itself whether the doctrine of lien is not in contravention of the policy of the statute of frauds, when applied to matters coming within that statute. A contract is implied that a certain property shall be held by B. as a security to A. for a debt due to him. The policy of the statute would require that such a contract should not be carried into execution by a Court of justice, unless it has been proved by some writing; but upon the principle of lien it is enforced by both Courts of equity and Courts of law, although there is no writing. This objection was taken and discussed by Sir E. Sugden,¹ in his remarks upon *Coppin v. Coppin*, and *Pollexfen v. Moore*, as to the rights of third persons to avail themselves of the lien. Mr. Coote thus states Sir E. Sugden's argument and his own answer to it.² "Mr. Sugden also urges that it seems to have been thought in *Coppin v. Coppin*, and apparently, he says, with some reason, that extending the vendor's lien to third persons would be breaking in upon the statute of frauds. And he argues thus: 'the general rule as to marshalling applies to cases where the person resorting to the personal estate has an actual charge or lien on the real estate, but in this case if equity first deems the purchaser a trustee for the vendor as to so much of the estate as will satisfy the purchase money unpaid, and permits a disappointed legatee to stand in the place of the vendor, it is erecting a charge on the land in direct opposition to the statute of frauds.' Now it is submitted, (continues Mr. Coote) in reply to this reasoning, that the inroad on the statute of frauds would not in fact be greater in the case here put than in the case of an equitable lien by possession of title-deeds, on which ground Mr. Sugden attempts to reconcile the judgment and decree in *Pollexfen v. Moore*. For in fact, in the latter case, the mortgage is raised on the presumption of equity, and then the legatee is let in to stand in the mortgagee's place. The cases are nearly parallel; or at all events are equally within the mischief intended to be prevented by the statute of frauds." The proper way to view the doctrine of lien in relation to the sta-

¹ 2 Sug. Vend. & Pur. 67, last edition,

² Coote, Mortg. 1821, p. 257. See *Mackreth v. Symmons*, 16 V. 339.

tute of frauds seem to us to be this :¹ in the case of the legal lien where A. has possession of the property on which he claims the lien, neither the letter nor the policy of the statute is violated; because no action is brought upon the implied agreement, but an action is resisted, namely the action by which the property would otherwise be recovered. But when the property of A. has passed into B.'s hands, and a bill is filed upon an implied agreement on the part of B. for the purpose of establishing the lien, there it is true that the policy of the statute is violated, because a suit is commenced upon an agreement, upon which there is no other than parol evidence. The same objection, however, is applicable to all mortgages by deposit of title-deeds, a proceeding of which many judges have expressed disapprobation, but all have acknowledged that it is too firmly established by the cases decided to be set aside by any authority less powerful than that of the legislature.²

The implied agreement to which we have been referring seems always to be of the same nature. We will suppose a person to have in his possession some property on which he has a lien. He then parts with it. The presumption is, that he had no intention to relinquish his security: it is supposed that he would not have parted with it, except upon an agreement that he should be allowed to have recourse to it afterwards, if his claim is not satisfied; and therefore it is inferred, that upon his parting with it, the next owner, knowing of the claim, has entered into an agreement that it should still retain the character of a pledge. Of this nature is the agreement for a pledge mentioned by Sir W. Grant. When a part-owner of a ship expends money for the benefit of all the other part-

¹ The words of the statute are, "That no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized, 29 Car. 2, s. 4.

² See the case of *Selby v. Selby*, 4 Russ. 341, in which the principle of marshalling the assets is approved of and enforced. See also *Trimmer v. Bayne*, 9 V. 209; *Headley v. Readhead*, Coop. Rep. 50; *Austen v. Halsey*, 6 V. 475.

owners, it is supposed that he would not do so unless the others had agreed to allow their shares to be pledges for satisfaction to him; an agreement to that effect is consequently inferred.

We now proceed to the mode in which the privities which we have mentioned have been established in the several classes of cases to which the law of lien is applied. We commence with the assignment of debts. A. owes B. a sum of money B. assigns the debt to C.; the question is, whether C. can sue A.; in other words, whether he has a lien upon the money in A.'s hand, but due to B. At law, it is indispensably necessary that A. should consent to take C. instead of B. as his creditor; he has, by incurring the debt, exposed himself to a suit by B., but he is not obliged at B.'s will and pleasure to submit to similar proceedings instituted by C. The principle upon which this rule is founded is the same as that upon which the law against maintenance of suits was established, namely, that debtors shall not be sued by any persons except those to whom they have chosen to make themselves liable. This principle has been recognized in a long series of cases, and proof of consent is strictly required. In *Legh v. Legh*,¹ an obligor was held to have consented to the assignment, when on receiving notice of it he offered no objection; but generally speaking a specific assent is required, as in *Tatlock v. Harris*,² where there was a general agreement of all the parties concerned, and in *Israel v. Douglas*,³ and *Crowfoot v. Gurney*,⁴ in all of which the absolute consent was considered indispensable. It also seems to be established by the above cases, that an actual debt must be subsisting between the assignor and assignee, and that that debt must be extinguished by the transactions. (See 6 L. M. p. 103.)

But Courts of Equity have established a different rule. They regard the debtor as a person whose conscience is affected with the duty of giving satisfaction for the advantage or consideration which he has received, as a person whose

¹ 1 Bos. & Pol. 447.

² 3 T. R. 180.

³ 9 Bing. 376.

⁴ 1 H. Black. 243. See also *Hodgson v. Anderson*, 3 B. & C. 854.

⁵ See, in addition to the cases before-mentioned, *Oble v. Dibblesfield*, Vent. 153; *Wilson v. Coupland*, 5 B. & A. 228; *Fairlie v. Denton*, 8 B. & C. 595; *Bailey v. Culverwell*, 8 B. & C. 448.

duty is to pay the debt whenever he is required to do so by his creditor; and they hold that this duty is precisely the same whether the creditor requires the payment to be made to himself or to some other person. As the debtor is bound to produce the money whenever the creditor chooses to demand it, the creditor, if the obligation is not fulfilled according to his demand, is justified in obtaining the money from some other persons, and throwing upon the original debtor the obligation thus newly contracted. Such seems to be the nature of the reasoning, upon which it has been ruled in Courts of Equity that the assignee of the debt has a lien upon the money in the hands of the debtor, without any consent upon the debtor's part. "The law," Lord Hardwicke said, in *Row v. Dawson*, "does not admit of an assignment of a chose in action. A Court of Equity does, and any words will do; no particular words being necessary thereto. In the case of a bond, it may be assigned in equity for valuable consideration, and good although no special form used." Again, "The debtor could not have paid this money to the original creditor without making himself liable to the assignee, because he would have paid it with full notice of this assignment for valuable consideration."¹ Upon this principle, a power of attorney to collect debts is a good security in equity,² and where A.,³ indebted to B., gives to B. an order upon C., who was indebted to A., requiring C. to pay the money to B., the order was held of itself to establish a lien upon the money in C.'s hands; and where two men⁴ agree for the sale of the debt, and one of them gives the other credit in his books for the price, the assignment is considered good in equity; nor does it make any difference that the assignment is made only by parol.

Having traced the requisites which are necessary for the establishment of a lien by the transfer of debts, we now come to those cases in which there are no debts between the different parties concerned, but simply an order given by one

¹ *Row v. Dawson*, 1 Vez. 332. See *Adams v. Claxton*, 6 V. 229; *Lett v. Morris*, 4 Sim. 610.

² *Exparte Scudamore*, 3 V. 85.

³ *Exparte Alderson*, 1 Mad. 53. *Exparte South*, 3 Swan. 393. *Smith v. Everatt*, 4 Bro. C. C. 64.

⁴ *Heath v. Hall*, 2 Rose, 271. See *Wright v. Ward*, 2 Russ. 220.

person to a second, that he shall deliver goods or money to a third. The question is, what effect has this order? In law, the person ordered is considered to stand in the same situation as the original debtor in the transfer of debts, and his assent is, in like manner, necessary for the establishment of the lien. The difference between the rules upon these two subjects is found to exist only in the courts of equity: for the assent of the person ordered is as necessary in the courts of equity as in the courts of law. The reason of this difference seems to be, that the conscience of the person ordered is not affected in the same way, as the conscience of the debtor. The person ordered has undertaken to serve the person who gives the order, but not to serve any one else, whom the person who gives the order may think proper to point out. He is like a servant or apprentice, who, having contracted to serve one master, cannot be compelled by him to serve any other master. Upon this ground a court of equity, as strictly as a court of law, requires proof that the person to whom the order is given has consented to obey it. There is a privity in these cases in respect of the subject-matter, and it is established by the agreement or notice or other understanding between the person who orders and him for whose benefit the order is given; but the privity of person with the holder of the property is wanting until he has given his consent, and therefore, until he has done so, the lien is not established as against him. The following cases will fully illustrate this doctrine. In *Robertson v. Lubbock*,¹ it was said in argument and not disputed, that although there is money sent to an agent to pay, and a mandate commanding him to pay, still, if there is no privity between him and the party who is to receive the money, the latter can bring no action against him. In *Gates v. Bell*,² a bill had been remitted for the payment of a debt: it was determined that the person to whom it was remitted would be liable only to the remitter, unless he had himself entered into some understanding with the person who was to be paid. The decisions in equity are, as we said, regulated by the same principle. In *Scott v. Porcher*,³ a consignment of pearls was made from Madras. No notice

¹ 4 Sim. 173.² 3 B. & A. 645.³ 3 Mer. 652.

was given to the persons for whose benefit the consignment was made, nor did the consignee in any way signify to them his acceptance of the trust reposed in him for their benefit. Afterwards, a new order was sent that the pearls should be forwarded to America. It was held that the consignment did not amount to an appropriation, and that the consignor had a right to alter the disposition of the property. *Ex parte Heywood*¹ was a still stronger case. The goods were consigned to the consignee, who was ordered to accept the bills of a creditor out of the proceeds of the goods, and the consignor informed the creditor of the orders which he had given. The matter was referred to a court of law, where it was determined that there was no lien. One of the principal cases at law upon this subject so closely resembles *Ex parte Heywood*, that it may well be mentioned in this place. We mean *Williams v. Everett*.² A., indebted to B., sent bills to C., desiring him to pay B., and sent to B., saying that he was to apply to C. for payment out of the proceeds of the bill. B. applied to C., who refused to pay him out of such proceeds. It was decided that B. had no lien upon the proceeds in the hands of C. There was, in this case, no assent of C., either implied or express, and had a loss occurred, it would have fallen upon A. and not on B. The latest case is that of *Watson v. Wellington*,³ which seems to reach the utmost limit at which a lien upon a particular fund ought, according to the true principles of equity, to be refused. The plaintiffs, the executors of a Mr. Sims, were creditors of Lord Hastings. Their solicitor was told by Lord Hastings, that he had directed Colonel Doyle, whom he had empowered to receive his share of the Deccan prize-money, to pay the debt and costs due to the plaintiffs; and at the same time Lord Hastings wrote and delivered to the solicitor the following letter addressed to Colonel Doyle: "As I shall leave to you the distribution of the prize-money, as soon as it shall be issued for me, I have to mention that the executors of Mr. Sims" (that is the plaintiffs) "are claimants on that fund for a bond debt with interest." The solicitor showed this order to Colonel Doyle, who then stated that it would be necessary

¹ 2 Rose, 355.² 14 East, 590.³ 1 R. & Mylne, 602.

to send to him through the solicitor of the marquis the particulars of the demands of Sims's executors. The Reporter says, that "the question was whether the plaintiffs had any lien on the fund." We acknowledge that the words used by Sir J. Leach would rather establish as a rule that an absolute engagement to pay out of a particular fund creates a lien; and it is not necessary, in order to maintain the law which we are now supporting, to question the correctness of Sir J. Leach's position. Our point is, that such an order was not sufficient to create the lien as against Colonel Doyle; that between him and the executors of Sims the privity of person was wanting; that, if he had been made a party by the plaintiffs, he could not have been compelled by them to execute in their favour the order which Lord Hastings had given, and that his own assent to the order was a necessary condition precedent to the establishment of the claim against him. We do not deny, that, if a suit had been instituted against Lord Hastings and all his effects had been collected under the order of the Court, the existence and non-existence of the lien would have been determined by the words of the order and the condition of the fund at the time when the order was written; but we maintain that there is nothing in this decision which shakes the distinction we have taken, namely, that a person ordered cannot be liable unless he has undertaken to obey. Colonel Doyle could not be liable to the executors of Sims merely because he had received particular directions from Lord Hastings; he was still master of his own conduct so far as respected the plaintiffs, and, had the language of Lord Hastings been ever so peremptory, might have altogether refused to obey without exposing himself to any proceedings on the part of the plaintiff.¹

There is one more case of want of assent which ought to be particularly noticed, *Baron v. Husband*.² There the holder of the money offered to pay it upon certain terms. A partial recognition of the order had therefore taken place, which makes this case go further than those previously quoted. Still it was decided that the person for whom the payment was intended had not

¹ See also upon this subject *Yates v. Groves*, 1 V. 281; *Stevens v. Badcock*, 3 B. & Ad. 358; *Carvalho v. Burn*, 4 B. & Ad. 326.

² 4 B. & Ad. 613.

such a privity with the holder as to be entitled to an action against him. It will be sufficient to quote one case in which the assent has been given. The case of *Fitzgerald v. Stewart* not merely shows the effect of the assent, but also the sort of conduct from which an assent will be inferred. In that case, a receiver in Jamaica sent goods to a consignee in this country, with orders to pay the proceeds to an incumbrancer. The proceeds were for several years duly paid. It was considered that this was a sufficient assent on the part of the consignee, and that an action or suit might be maintained against him by the person for whose benefit the consignment was made.¹

Upon the distinction which we have been endeavouring to draw respecting the effect of orders of this kind, a difficulty seems to suggest itself, which ought not to be altogether omitted: If the person for whose benefit the order is given has no lien upon the goods in the holder's hand as against him, unless he has received from him some assurance that he will obey the order; or if, in other words, there is no tie in respect of the goods between himself and any person except the consignor, why is there ever any necessity for an interpleading suit? Why is it not always sufficient for the holder, as soon as a suit is commenced against him, to return the goods to his consignor, and then plead that he has not got them. In *Mason v. Hamilton*,² Livermore was consignor, Mason consignee, and Hamilton the person to whom Mason was ordered to transfer the goods. It does not appear in the report that Mason ever informed Hamilton that he held the goods for him. Supposing then that our law is correct, and that Hamilton had no lien on the goods in the hands of Mason, why would not Mason have been safe, if, on receiving notice from another party that he had a claim on the goods, he had simply returned them to Livermore as his original employer. He would thus have performed the common duty of agent, and restored the goods to the person from whom he had received them. The difficulty disappears when we consider the real ground on which a bill of interpleader is founded. "A bill of interpleader," says Mr. Maddock,³ "is resorted to where

¹ 2 Sim. 340. See also *Hassall v. Smithers*, 12 V. 120; and *Brummell v. M'Pherson*, reported in 5 Russ. 263.

² 5 Sim. 19.

³ 1 Maddock on Equity, 173.

a person claiming no right in the subject, and not knowing to whom he ought of right to render a debt or duty, apprehends injury from claims made by two or more claiming in different or separate interests the same debt or the same duty." There is still wanting one important term in the definition. The plaintiff in the interpleading suit has received the goods from one claimant. We cannot pretend to investigate the whole question at present, but we believe it will be found upon a correct examination that the interpleading suit will not lie, unless the second claimant founds his title upon some transaction with the first claimant, which has taken place since the time of the consignment. Just as in the case of a tenant, who may interplead against his landlord and a mortgagee only in case the mortgage is subsequent to the period of his own demise. If the claim arises from a previous transaction, the consignor's rights are the same at the time when the claims were made as they were when the consignment was made; and the holder of the goods having consented to be agent in the first instance, can suggest nothing in the conduct of the consignor to prevent his remaining agent, he may therefore be required to perform the duty of agent by giving up the goods to his employer. But if the consignor chooses, after the period of the consignment, to make a change of his rights by making an assignment, then the consignee is justified in holding the goods until the right is determined. We believe this to be the strict principle, upon which the different cases may be reconciled, although it has not been explicitly laid down, except in the case of a tenancy of land. But this case is very different from that of a mere order. A transfer on good consideration changes the right to the goods while in the hands of the consignee, whether the consignee does or does not assent; but a mere order cannot, we maintain, affect the duty of the assignee in respect of them unless he has expressed his assent.

In *Mason v. Hamilton* the claim did not arise by any order, but by some supposed transfer upon good consideration. In *Smith v. Hammond*,¹ the claim was founded upon a supposed indenture of assignment. To produce a case in which a consignee, having never promised to execute the order received,

¹ 6 Sim. 13.

still was driven to his bill of interpleader, is no objection to the rule which we have been supporting, unless it can be shown that the claim which was considered a sufficient foundation for an interpleading suit arose upon that order and upon nothing else. We have been able to discover no such case, and therefore we do not think that the law upon interpleader at all interferes with the distinction we have drawn.

Having treated of those rights which exist between the consignee and the person for whom the consignment is made, we now come to the rights of the consignor against the consignee. The most familiar instance in which their rights are brought under consideration, is that in which a banker, having received money or goods consigned to him, becomes bankrupt. In all cases which fall under this head, the privity of person is free from doubt. The point to be determined is the privity in respect of the thing, or, in other words, that the property on which the lien is claimed is the identical property consigned. The distinction which the cases seem to establish is, that where the identity of the property can clearly be made out, the lien exists. Where mere money has been sent and has been mixed with the other money of the banker, it can no longer be identified, there is no earmark, and the lien is gone: but if the money has been sent with directions to lay it out in goods, or in exchequer bills, or shares of stock, and the bills or the documents which establish the title of the stock have been set apart for the consignor, or entries have been made showing his ownership of the goods, he may recover the property as his own. Or, if a merchant has sent goods to his factor who still has them in his possession, or having disposed of them retains the price separate from his other effects, the merchant may recover the goods or the price.¹ If bills are sent with an order for their conversion into money; the order would, generally speaking, cancel the right of the consignor to claim the proceeds as specifically his own. If, however, he has ordered his correspondents to use the proceeds in making any particular pay-

¹ Paul v. Birch, 2 Atk. 622; *Exparte Dumas*, 1 Atk. 233; *Taylor v. Plumer*, 3 M. & S. 563; *Grigg v. Cocks*, 4 Sim. 444; 2 Vern. 637.

ments, he will be considered to have appropriated those proceeds and still to retain his lien¹ to that extent.

The next class of cases to which we shall advert, are those in which particular property is bound by express or implied agreement. Wherever persons agree upon good consideration concerning any particular subject, in a Court of equity their agreement constitutes a trust as against the parties themselves, and any claiming under them voluntarily or with notice.² When the property has not passed into the hands of third persons, there is no doubt as to the privity of person; the doubt then is, whether the property in question is bound by the agreement, or (according to the words which we have used) as to the privity in respect of the thing.

The lien of a vendor who has parted with the estate sold, and that of the vendee who has parted with the purchase-money, seem to fall under this head. It is thus described by Sir Thomas Clarke in *Burgess v. Wheald*.³ "Where a conveyance is made prematurely, before money paid, the money is considered as a lien on that estate in the hands of the vendee; so, where money was paid prematurely, the money would be considered as a lien on the estate in the hands of the vendor for the personal representatives of the purchaser." It is supposed that the vendor would not part with the estate, nor the vendee with the purchase-money, except upon the supposition that such liens should respectively exist; and therefore a Court of equity seems to assume that an agreement to that effect has taken place, and that the estate, in the one case held by the vendee, in the other case by the vendor, is affected with a trust, and is a pledge for the money. The existence of a lien under implied agreements of this kind has long been ascertained, but there have been many cases in which it has been more doubtful whether an agreement ought to be implied. For instance, where the fortune of a lady about to be married was given either to the intended husband or to his father, for the purpose of clearing the family estate from incumbrances, it was determined that she had a lien upon that estate for a jointure.⁴ In another case a

¹ *Exparte Oursell*, Amb. 1.

² See *Legard v. Hodges*, 1 Ves. jun. 478.

³ 1 Black. 123. See *Mackreth v. Symmons*, 15 V. 345; see also *Walker v. Preswick*, 2 Vez. 621.

⁴ *Probert v. Clifford*, 2 P. W. 544.

jointure-annuitant joined in the sale of the estate which was charged with her jointure, and allowed the proceeds to be invested in stock. In course of time the interest of the stock became insufficient to pay her the full jointure, and a question was raised, whether she had a lien upon the principal for the difference. The question was decided in the affirmative, partly upon the construction of the deeds applying to the transaction, partly upon the general supposition that the annuitant would never have parted with the land, which was a perfectly good security, and trusted to the stock which was less certain, except upon an implied understanding that the principal of the stock should be liable for supplying the deficiency.¹

A Court seems to be acting upon an implied agreement where a trust is raised in a case of fraud. The Court then appears to assume that the party in question did not intend to act fraudulently, that he intended to fulfil his obligation, but in a way of his own, not quite in that way which seemed to be the most natural and straightforward. A trust for the performance of the duty is thus raised, and the property of the party in question is affected with a lien.²

The language of Sir L. Shadwell in *Fawcett v. Whitehouse*,³ seems to put a construction of this nature upon fraud, as it is considered in equity. Fawcett was a partner with Shand and Whitehouse, and Whitehouse, in negotiating a purchase for them from Knight and Co., had contrived to obtain for himself a bonus of 12,000*l.* Sir L. Shadwell, after narrating the circumstances, says,—“ I am of opinion, upon these grounds, and considering the situation in which he stood, that he was not at liberty to take to his own profit any part of that consideration which Knight and Co. were willing to pay to get rid of the business, but that he was bound to obtain the best terms possible for the intended partnership, consisting of Fawcett, Shand, and himself, and that all he did will be con-

¹ *Arundell v. Arundell*, 1 M. & K. 327.

² We may here refer to *Cox v. Bateman*, 2 Vez. 19. A trustee there purchased with trust-money a real estate in Ireland. Lord Hardwicke said he could not follow the money and charge his real estate therewith: “ It must be a breach of trust, and must be a charge on the personal estate.” We cannot help submitting, that if the money was clearly traced, the real estate should have been made liable to the trust.

³ *Fawcett v. Whitehouse*, 1 Mylne & K. 149.

sidered as if he had done his duty, and had actually received the 12,000*l.* for the new partnership, as upon every equitable principle he was bound to do. I am of opinion, therefore, that this is what must be called in equity a fraud on the part of the defendant."

Where a father, being tenant for life with remainder to his children in tail, had persuaded them to join him in a deed for the purpose of levying a fine—a bill was filed for the purpose of establishing a specific lien upon the money paid for the estate. The Court held clearly, that as the testator had obtained the signatures of the children fraudulently, he must be considered a trustee for the amount; but as no agreement had been made, so as to make this particular fund answerable, it was to be considered a general charge on the estate, not as a specific lien. The father had imposed upon himself an obligation, and was treated by the Court as if he had agreed to fulfil it: all his estate was therefore made liable to the fulfilment of it, though no part of his estate was held to be so specifically affected as to be liable to this in preference to all other obligations.¹

On the principle of an implied agreement, a mortgagee² of an estate upon lives renewable by fines is considered to have a lien upon it for the money which he pays by way of fine. A similar³ advantage is given to a joint-owner with the respect to the shares of the other joint-owners of the estate, and so one part-owner of a ship has a lien upon the shares of other part-owners for money laid out for the general benefit of the ship.⁴

The next cases are those in which the agreement is express. As where A. agreed to sell land to B., and to place the purchase-money in C.'s hands, to be expended in paying off incumbrances, it was decided that B. had a lien upon the money for this purpose.⁵ And where notes were issued to pay a certain sum of money, with these words in addition, "being a portion of a value as under, deposited in security for the payment thereof according to a receipt in our hands." The value

¹ *Newcomb v. Burdon*, 2 *Anst.* 343.

² *Manlove v. Bale*, 2 *Vern.* 4.

³ *Hamilton v. Denny*, 1 *B. & B.* 202.

⁴ *Abbott on Shipping*, p. 78. Of the lien of a tenant in common of a *West India* estate for money spent in cultivating it, *Scott v. Nesbitt*, 14 *V.* 444.

⁵ *Farr v. Middleton*, *Prec. in Ch.* 174.

referred to consisted of platina. It was decided that a specific lien was established by these words. A specific¹ lien was also established in favour of particular creditors to whom an officer had desired that the proceeds of his commission should be paid. There is a long series of cases in which there has been a covenant affecting lands. The covenant in *Roundell v. Breery*² was made by a father to settle lands of the value of 150*l.* per annum, but no lands in particular were mentioned. It was determined to be a lien upon the lands; but such a covenant is not a specific lien as against all³ creditors, but a general lien on the lands under which the persons entitled to the benefit of it would take in common with the specialty creditors. In *Power v. Bailey*⁴ a charge was made in consideration of marriage, and it was determined to be not merely a personal covenant, but a charge on the whole estate. A similar decision was made in *Legard v. Hodges*, in which the covenant was to set apart and pay to the trustees one-third part of the clear annual profits of the estates.

A doubt sometimes arises whether the property in question, at the time when the agreement was made or must be supposed to have been made, was of such a nature or in such a state as to be liable to the lien. In all these cases the property is in the hands of strangers. As where a person covenants⁵ to settle land, having no land at the time, but makes a purchase of some land afterwards; or where a person⁶ covenants to pay money to trustees to be by them laid out in land, and does not pay them the money, but himself buys some land: in both cases no particular land is specifically intended at the time when the covenant is made, but the Court of equity acts upon the supposition that a person who makes a covenant intends by one means or another to fulfil it: just as in the case of a fraud, it frequently assumes that a person intends to perform in one way, a duty of which he has fraudulently avoided the performance in another. In this case the Court implies a trust, and so in the two cases which we before mentioned, the Court assumed

¹ *Collyer v. Fallon*, 1 *Turn. & Russ.* 460.

² 2 *Vern.* 482.

³ *Fremoult v. Dedire*, 1 *P. Will.* 429.

⁴ 1 *Ball & B.* 49.

⁵ *Deacon v. Smith*, 3 *Atk.* 323; *Lechmere v. Lechmere*, *Ca. temp. Talbot*, 93.

⁶ *Sowden, v. Sowden*, 1 *Bro. C. C.* 583.

that the purchase of the estate was made in pursuance of the covenant, and a lien was established upon the purchased estate for the trusts of the settlement. In *Gardner v. Townsend*,¹ an attempt was made to carry one step farther the principle of attaching a lien to property not yet ascertained. In that case Lord Townsend, the father, had covenanted to settle land valued at 5000*l.* a year, on Lord Townsend the son; and Lord Townsend, the son, had covenanted to settle land to the value of 4000*l.* a year. Under a decree of the Court, Lord Townsend, the father, was compelled to fulfil his covenant and to settle the land, after which a bill was filed for the purpose of establishing upon the land a lien in favour of the trusts of the second settlement. Sir William Grant dismissed the bill, without giving the grounds of his decision, but it certainly appears that to have established the lien would have been carrying equitable doctrines to a very great length. It must have been assumed, not merely that a person bound by an obligation was fulfilling it by a subsequent purchase, but that property which came to his hands by the fulfilment of another person's obligation, was necessarily the very property which he originally intended to settle; that he intended to fulfil his obligation by a particular act, which could not be done unless a certain other person had previously fulfilled his obligations. To assume such an intention would be manifestly inconsistent with the words of the covenantor, who would have referred specifically to the fulfilment of the first covenant, if such an intention had been present to his mind. *Lench v. Lench*² is a case which it is worth while to mention here, as it is a case in which an attempt was made to establish a lien upon two distinct principles. Money had been settled for the separate use of the wife; the husband got possession of it and spent it in purchasing land. The object of the suit was to establish upon this land a lien in favour of the wife. The suit failed because there was no sufficient evidence that the money spent was the identical money which had been settled upon the wife; but two arguments were used upon the supposition that this could be proved; one, that the husband having fraudulently obtained

¹ *Coop.* 303.² 10 *Ves.* jun. 511.

the money, the property purchased must be affected with a supposed trust : another, that if the money was not fraudulently obtained, but given for the purpose of buying the land, it must be assumed that there was an agreement to make a settlement upon the land so purchased. The reason why this latter argument was inapplicable, was that there was no sufficient proof that any such agreement was made or intended to be made on the part of the husband.

It is necessary to make some further remarks upon the effect of agreements respecting property held by third persons. We have said that a mere order given by A. to B. to hold certain property for C., will not create a lien upon it in favour of C. as against B. This rule will not however apply, where an agreement upon good consideration has been made between A. and C. By this agreement the right to the property has passed from A. to C., and B. who took it into his custody as belonging to one, now retains it as the property of the other. A. has parted with the right, which C. has obtained, and the possession of the property retained by B. after the right to it has passed to C., has itself established a privity between B. and C. ; the consequence is, that C. has a lien upon it in the hands of B., and may institute a suit against him, if he refuses to surrender it. In some cases A. and C. have disputed the right, and B. having no interest in the dispute has sought only to protect himself from injury, which he is allowed to do by a bill of interpleader. We before mentioned the precise circumstances under which a bill of interpleader will lie, and we will dwell upon the subject no further at present, than to point out the analogy which exists between the assignment of debts and the effect of agreements upon property in the hands of third persons. The simple case of the assignment of a debt is, that A. owes money to B., which B. assigns to C. Suppose that instead of a sum of money which is not earmarked, it were a sum tied up in a bag, which belonged to B. and was in the custody of A., and that B. agreed with C. to transfer to him the right to the contents of the bag, this would be an instance of an agreement upon property in the hands of third persons.

Although the common question with respect to such liens as arise out of agreements, relates to *privity* as to the thing,

there still have been cases in which the question has turned upon the privity of person. Where for instance, A. sold estates to B., and B. covenanted amongst other things to pay certain sums of money to C. and D., and it was determined, that as C. and D. had no privity with the covenantor, this was no lien upon the estates. "How,"¹ it was asked, "can a lien be created for third persons?" So in *Foster v. Blackstone*,² there being a deed of trust to pay certain annuities, it was decided that they had no lien upon the trust estates, for they were not parties to the deed nor privies. Sometimes persons are in such a situation that no privity can be established between them and the subject matter in question, as persons incapable of purchasing land can have no lien on a landed estate.³ An assignee⁴ of a bankrupt having seized goods of one of his own debtors in the hands of his bankrupt, can establish no lien upon them. Nor has a partner any lien upon partnership property, allotted to other partners, after a dissolution has taken place.⁵ Sometimes the lien is good against one set of persons and bad against another set, as where executors,⁶ being also trustees, agreed to mortgage certain premises to one of the legatees, as a security for his legacy, and delivered title deeds to their agent for the preparation of the mortgage deed, it was held that an equitable lien was established against the executors, though not against the other legatees.

Lien in matters of shipping has been discussed in a former Number (14 L. M. 98). Lord Tenterden also has fully treated of it. The shipbuilder has a lien upon the ship so long as it remains in his dock, and a shipbuilder abroad has a lien upon it even when out of dock, for repairs which he has done to it: the principle being, that when the builder cannot have access to the owners, he shall have the ship as his security, that he may not be discouraged, by apprehension of want of repayment, from doing the repairs necessary for the ship.⁷ But the shipholders and other persons who have contributed to the neces-

¹ *Clarke v. Royle*, 3 Sim. 500.

² *Foster v. Blackstone*, 1 M. & K. 310.

³ 2 Sug. Ven. & P. 59. *Harrison v. Southcote*, 2 Ves. 389. See now 10 Geo. 3.

⁴ *Ex parte White*, 1 Atk. 90.

⁵ *Linger v. Simpson*, 1 S. & S. 602.

⁶ *Hockley v. Bantock*, 1 Russ. 144.

⁷ See *Abbott on Shipping*, 106.

sary outfit of the ship, have a lien upon the freight.¹ The shipowners have also a lien upon the goods put on board for freight, but not for dead freight or demurrage.²

The Courts of Equity appear to show every favour to the claims of a person entitled to a lien, and take care that he has the entire benefit to which he is entitled, even where the property itself has passed into the hands of third persons. This favourable inclination was particularly marked in the case of *Exparte Morgan*. The person claiming the lien was an equitable mortgagee, who, on the mortgagor's becoming a bankrupt, and the property in question being sold to one of the assignees, gave up the title deeds, receiving a smaller sum than the debt for which they had been his security. It was afterwards discovered that the assignee sold the estate at an increased price, on which a decree was made that the mortgagee had a lien on the estate for the payment of the remainder of his debt. It seems to have been argued, that if there had been no mortgagee, the mortgagor would have been entitled to this increased sum, and that the mortgagee had a claim to every advantage in respect of the estate, which the mortgagor might have claimed if there had been no mortgage. Thus, through the mortgagor the mortgagee was able to establish both the privities which we have mentioned as requisite; the privity with the fund paid in respect of the estate, and also with the assignee who held the fund.³ Another instance of the favour shown by the Courts of Equity to the doctrine of lien appeared in *Exparte Cheesman*. The ship in which the master had a lien was captured. The benefit of the lien was of course lost by the capture. The ship was however recaptured, and it was decided that the effect of the recapture was to restore the lien.⁴

The Courts of Equity will examine with the utmost accuracy what property is affected by the lien, where the property originally affected has been in any way exchanged⁵

¹ *Exparte Hill*, 1 Mad. 62.

² *Phillips v. Rodie*, 15 East, 554. See also *Birley v. Gladstone*, 3 M. & S. 207, in which an attempt was unsuccessfully made to extend the lien by a covenant taken from foreign charter parties.

³ *Exparte Morgan*, 12 V. 6.

⁴ *Ex parte Cheesman*, 2 Eden, 181.

⁵ As an example of the accuracy with which a Court of Equity will trace the

for any other property ; as, in a case in which a ship and the future freight, and the goods about to be put on board, had been assigned as a security for all advances made and to be made. The question to be decided was, whether the lien attached to a bill, which was the proceeds of part of the goods in question, sent to the owners but not indorsed to them. The lien was decided to be good in equity though not at law. It was said that the Court would compel the indorsement of the bill if that were necessary, and that if that had been done, the bill would have been in the situation of any purchase-money which might have been paid for the proceeds.¹ And where a part of the property has changed hands, the Court will attend to the quantity of it which may be affected by the lien. For instance, where the lien is upon the freight, and before one portion of the freight is earned, the ship has been sold, the lien is only upon that part of the freight which was earned previously. So also where there are several part-owners of a ship; in which case the creditors of one have no lien on the shares of the others, unless the one part-owner has been allowed by the others to appear to be the sole owner of the entire ship.² In such a case the lien *may* extend to the whole freight; for one great principle, upon which Courts of Equity are guided on this subject, is that persons who have reposed reasonable confidence shall have the benefit of the security in which they have confided. In conformity with this doctrine, it was said by Lord Eldon in *Exparte Rowlandson*, "If one partner puts another into the sole possession of the partnership estate and effects, and leaves them in his sole order and disposition, giving him title under an instrument upon the face of it giving title, it would be difficult to insist that he would have a lien upon that property for the consideration money against the separate creditors of the other; considering that he had by title and by his own act left this property in the sole order and disposition of the other."

It should be observed, that a creditor has not a lien upon

change of property to which a lien attaches, see the late case of *Small v. Attwood*, *Younge*, 507.

¹ *Curtis v. Auber*, 1 J. & W. 526.

² *Exparte Harrison*, 2 Rose, 76.

his debtor's goods merely because he gets them into his possession; for the goods may be altogether unconnected with the transaction upon which an attempt is made to set up the lien, or they may have been put into the creditor's possession in consequence of some specific agreement. If such an agreement has been made, it will determine the extent to which the lien can be carried; as where securities are deposited for the payment of a particular sum, they must be restored when that payment has been made,¹ or where deeds have been deposited as security for advances to be made in future, they cannot be retained as security for advances² made beforehand.

A doubt sometimes arises as to the nature of the instruments which are necessary for the establishment of different species of liens. With regard to land it was at one time held that evidence must be given of the purpose for which particular deeds have been deposited, and that if they were deposited not as an equitable mortgage, but for the purpose of having a mortgage-deed executed, there would be no lien.³ However this doctrine has since been overruled,⁴ and a mere letter containing a promise to give a mortgage has been held to establish a lien against creditors.⁵ A deposit of Court rolls will constitute an equitable lien.⁶ A mere specialty debt is no lien on land,⁷ but a judgment is a lien on land,⁸ though no estate in it,⁹ and if the land is leasehold,¹⁰ it is a lien after, not before execution. With respect to shipping,¹¹ a bill of sale will be sufficient to constitute a lien upon a ship abroad; but not so an agreement by parol, or a bill of exchange. The rights of the master stand upon a different footing. If he makes payments¹² or draws bills for repairs,

¹ *Vanderzee v. Willis*, 3 Bro. C. C. 22.

² *Mountfort v. Scott*, 1 Turn. & R. 274.

³ *Morris v. Wilkinson*, 12 V. 200.

⁴ *Hockley v. Rantock*, 1 Russ. 144; *Ex parte Bruce*, 1 Rose, 374; *Edge v. Worthington*, 1 Cox, 211.

⁵ *Card v. Jaffrey*, 2 Sch. & Lef. 382, overruling *Williams v. Lucas*, 2 Cox, 160.

⁶ *Ex parte Warren*, 19 V. 162.

⁷ *Forrester v. Legh*, Amb. 174.

⁸ *Stonehewer v. Thompson*, 2 Atk. 440.

⁹ *Brace v. Marlborough*, 2 P. W. 491.

¹⁰ *Shirley v. Watts*, 3 Atk. 200.

¹¹ *Ex parte Halkett*, 19 V. 474.

¹² *Hussey v. Christie*, 13 V. 594.

or for necessary supplies to the ship, he has a lien on the ship and no deed of hypothecation is necessary.

Courts of Law and Equity show the utmost favour to liens, not merely in securing their full value to persons entitled to them, but also in maintaining them against every claimant. This rule cannot be more strongly marked than by the decisions made in respect of the rights of the Crown. Where a borrower on borrowing money agreed by recital in a bond that certain real property, freehold and leasehold, should stand pledged for the repayment of it, and title deeds were delivered so as to create in equity a mortgage or a right to a mortgage; the lien was held good against the prerogative lien of the Crown in respect of debts subsequently accruing to the king, and the equitable mortgagees were entitled to be first paid principal and interest out of the produce of the sale of the premises, though it was the property of a Crown debtor, and had been seized under an extent in chief.¹ But we have already occupied so much space that we cannot bring to a close our remarks upon the doctrine of liens; we reserve to ourselves, as a subject for a future number, the principles upon which a lien is waived or extinguished.

C.

ART. IV.—MERCANTILE LAW, NO. XVI.—ON MERCHANT
SHIPPING.—(*Continued.*)

CASTING back a glance at what has already been done, it will be seen that we have now passed under review—1st, The modes in which the ownership of a merchant vessel is acquired, held, evidenced and transferred, with the requisites to be observed for securing to it the privileges of a British ship—2dly, The general management of the vessel and the relation of part-owners, as a body, as well to third parties as to each other—3dly, The appointment and qualifications of the master and crew, and the rights, powers, duties and obligations of the former, in relation to the owners by whom he is ap-

¹ Pector v. Philpot, 12 Price, 197.

pointed, to third parties with whom he contracts, and to the crew placed under his command—4thly, The rights and duties of the mariners who compose the crew—5thly. The out-fitting and repairing of the ship at home and abroad, with the ordinary powers and obligations thence resulting, as well as the extraordinary power of hypothecation and sale under circumstances of exigency—And, lastly, certain ordinances and provisions of public policy for the security of navigation and commerce, more particularly in the matters of pilotage and convoy.

At length therefore, it seems, we are free to enter upon the subject to which all these inquiries, however necessary and important, are but preliminary—the employment of the vessel by the owner, as a vehicle for the transport of merchandize. There are, it is true, other ways in which the owner of a vessel fitted for the merchant service may turn his property to account. Thus he may let the body of the ship for a term of years or months to another, who becomes as it were the tenant, and takes upon himself, for the term of his tenancy, not only the direction, but the entire management and outfit: but as such a case has evidently nothing to distinguish it from the letting to hire of any other chattel, it may be passed over with the remark that the person so hiring or renting the vessel, for all purposes of contract, stands, for the time being, in the relation of owner.¹

Again, a merchant vessel may be let (not only for purposes of warfare, which are manifestly foreign to our inquiry, but) for other uses besides that of the conveyance of goods, as for the carriage of the mail, the transport of troops or convicts, or the like: or it may be employed generally as a packet ship for the conveyance of passengers, or, as in the case of vessels trading to the East Indies, may receive both passengers and cargo: in none of these various employments, however, are there any such peculiar incidents or obligations as to render a separate consideration necessary; nor, indeed, though

¹ A person so circumstanced was termed in the civil law "*exercitor navis*" the employer of the ship, as distinguished from the paramount owner or "*dominus*." In like manner, and for the same purpose, he is designated in the French law by the name of "*armateur*," as distinguished from the "*propriétaire*." It is to be regretted that some such distinction of terms does not exist in our law.

they may serve for illustration, do they fall properly within the boundaries of our subject. We may dismiss also from view a case of occasional occurrence, where the registered owner himself loads the vessel, and despatches it on an adventure for his own account; for where there is no contract, there can of course be no obligations.

The ordinary case, and the only one to which our attention will now be professedly directed, is that where the owner tenders his ship, furnished, equipped, and appointed, for the reception and carriage of goods, and the merchant or other person, who may be desirous of so employing her, enters into a bargain with him for that purpose.

This bargain, however made or evidenced, is called a *contract of affreightment*, and it is, in legal definition, the letting out to hire on the one part, and the taking to hire on the other for a time, or for a specific voyage or adventure, of a vessel, or of the whole or a part of the room and stowage of a vessel, with its appointments, and the services of its master and crew, for the purpose of carriage by sea.¹ The contract for hiring a vessel or the whole or a principal part of the room and service of a vessel, with its appointments, is the subject of a special agreement, generally, if not always, reduced into writing,² and known among merchants by the name of a charter party.³ A vessel so let to hire is said to be chartered, and the person hiring is designated as the charterer. The charter party is sometimes a deed, that is to say an instrument under seal, and sometimes not so, in which

¹ None of the definitions which we have met with sufficiently mark the distinction as to the *subject hired*. Two entirely distinct sets of obligations result from the hiring out of a chattel, and the hiring out of services—*conductio et locatio rei*, and *conductio et locatio operarum*.

² By the French ordinance, and still by the law of France, the charter-party must be in writing, but yet it is said a valid contract may arise without a writing, the ordinance having regard merely to the mode of establishing it by proof. It is observable that in the foreign jurists the term charter-party is used synonymously with the contract of affreightment, according to them there being no such contract without a charter-party express or implied. See Pothier, *Traité de Charte-Partie*, Valin, Pardessus.

³ *Charta partita*—a writing divided into two parts, one to be held by each of the contracting parties, and being in commercial law what an indenture is in common law. For the origin and etymology of the word, see Pothier *ubi ante*; and Ab. on Sh. p. 162, note (a).

case it is usually called a memorandum of charter party, as if intended merely as a note for the more solemn instrument to be subsequently executed.¹ It may be entered into by the owner, either singly or conjointly with the master, or, as when executed abroad, for the most part it necessarily must be, by the master alone: of the power of the master to bind the owner by such a contract enough has been already said.²

Where there is no special agreement or charter with any one in particular, the vessel is put up by public advertisement for the reception of cargo generally to be carried to a specified port of destination, and it is then said to be a general ship, or a ship on general freight.³ The term "freight" is applied indiscriminately to the stipulated hire or remuneration to be paid, whether for the vessel itself, or for the use and room of a whole or of some part, and whether the ship be chartered or general; and it is either a "time freight," that is to say, calculated with reference to the time during which the service is to continue, or it is estimated by the tonnage of the vessel, or, more frequently, by the weight or tale of the cargo to be shipped. The merchant who charters a vessel for loading is called also the "freighter," and he who consigns goods by a general ship is more frequently spoken of as the "shipper."

The various kinds of hiring comprehended within this general term of a contract of affreightment may be rendered more intelligible by a familiar illustration. A coach may be hired with horses, harness, &c. complete, and together with a coachman or driver in the owner's service, either for a specific time, as a year, or for so long a time as the hirer may choose, at a certain rate per month, or for a stated service, such as a tour on the continent, or the like. By this hiring, the coach and horses become for the time being the hirer's own; he has the control and direction, for he may take them where he likes; he has also the possession, for he may occupy the coach by whom and as he pleases, so it be not

¹ A stamp of 11. 5s. is required for either.

² Ante, vol. xiii, p. 385.

³ The French have a mode of hiring a vessel, or rather part of it, for carriage, to which we have nothing exactly corresponding. It is called a "*location à cueillette*," and it consists in the letting to freight of a part of the ship under an implied condition that if the remaining space be not filled up by other consignments to the extent of three-fourths within a given time the contract shall be off.

inconsistent with the general purpose for which it was let; and finally the driver, though appointed by the owner, and his servant, so far as the general charge and superintendence of the property itself is concerned, is *immediately* the servant of the hirer, being subject to his orders and direction. Secondly, the engagement may be of this kind—The owner of the coach may contract to take a party by his coach, and, of course, therefore, by his own horses and driver, on a particular expedition—as from London to Oxford and back—either for a stated sum, or at a certain rate per day for so long a time as the employment shall continue. Now, in this case, it is evident that it is not the coach itself which is let, but the use and accommodation only of the coach, together with the services of the owner by means of his horses and driver for carrying the hirer on the intended expedition. The latter has nothing to do with the management or direction of the journey, and the coach and horses cannot in any sense be considered to be *his*: all that he stipulates for, is that he shall have the whole use of the coach for his party, and that they shall be carried to the place of destination and back on the terms agreed. There is, lastly, the common instance of taking one or more places in a stage-coach, either plying regularly between two points, as Oxford and London, or offered to the public for the conveyance of passengers generally to some particular place on a special occasion, as, of a festival, election, or the like: in which case the transaction is manifestly a hiring of a certain space or room in the coach, together with the service of the horses, driver, &c. for the purpose of being carried to the specified place of destination.

Applying now these several cases, so distinguished, first, to a van or waggon employed in carrying, not persons, but goods, and next, to a merchant-ship, which may be regarded as a van or waggon of the sea, we have, first, the chartering of a whole vessel, with its apparel, stores, master and crew, where the vessel itself is let out for a term or adventure; secondly, the chartering, also for a time or adventure, where only the use of the vessel, so furnished and equipped, is let; and thirdly, the hiring of a portion of the space for stowage in a general ship, with the like use of the vessel for carriage. In the first of

these cases the charterer becomes the owner *pro tempore*; the cargo which he may place on board is in his own occupation and possession; and the master, though appointed by and accountable to the ship-owner, and though in virtue of that appointment, not only the commander of the vessel, but the mandatary also of the owner's property on board, is at the same time for many purposes the servant of the charterer, being subject to his orders, both as to the direction of the adventure, and as to the care and disposition of the cargo. In the two other cases, the entire property, possession and control of the vessel remain with the owner, the stipulation of the charterer being simply for the whole or a portion of the space within it, together with the use and service of the vessel as a vehicle of goods, and the service of the owner, by his master and crew, for carrying them to a given destination. In the one case, therefore, the owner may be regarded rather as a letter-out to hire than as a contractor to carry; in the others, rather as a contractor to carry, than as a letter-out to hire.

That the distinction here pointed out is one of practical importance, and not of subtle definition merely, will be at once apparent to the lawyer. It is a distinction which not only materially aids the right understanding and determination of certain questions of contract, such as those arising out of claims for work done, or supplies furnished to the vessel, of which instances have been already given; or for non-delivery or damage of goods shipped by third parties on board a chartered vessel, which will be presently noticed; but is in some cases positively and alone essential. Thus the right to stop in transitu is determined, as we have seen, by the delivery of the goods to, or into the custody or warehouse of, the buyer. Suppose then a delivery on board a vessel chartered by the buyer, the question whether by such delivery the transitus is at an end must depend on this—whether by the charter-party the vessel itself was demised so as to vest the possession in the charterer, or the room and service only, the possession remaining with the owner. Accordingly, in the case before mentioned of *Fowler v. Kymer*,¹ where from the charter-party it appeared that the vessel was demised for a term of three years, during which period the charterer was to have the entire

¹ 3 East, 396.

disposition of and controul over the ship, it was considered that the vessel was the charterer's own, and that goods delivered to his order on board were in fact delivered to him or into his warehouse; whilst, on the other hand, in a subsequent case,² where the charter-party imported merely an agreement between the master and the merchant that the vessel should proceed to a specified port, should there load from the factors of the merchant a complete cargo of stowage goods, with which he should proceed to London, and there deliver them to the charterer, or his assignees, on payment of a specified freight, the contract being manifestly for the service of the ship merely, it was decided that the right of stoppage was not taken away by the delivery on board.

Again, the owner of the ship, as will hereafter appear, has a lien upon the cargo for the payment of the hire or freight; but as there *can* be no lien without possession, (for how can a man withhold what he has not got?) it becomes necessary sometimes to determine whether by the charter-party the owner has not divested himself of the possession, and so given up his lien. Nor is this in all cases a problem of easy solution: on the contrary, there are, perhaps, few questions in the whole range of mercantile law which have been less clearly defined, or seem, at first sight, less reducible to rule. To this uncertainty various causes have contributed: in the first place the looseness and want of precision with which men not only express, but actually form their ideas, renders the interpretation of agreements, not reduced to technical formulas or framed by professional care, at all times a difficult and perplexing task. In the next place, our system of law is peculiarly artificial, admitting of, and indeed rendering necessary, minute distinctions unknown to the codes of most countries. Lastly, as in the instance before us, a judgment is sometimes hastily given upon an imperfect view of the particular case, and without mature consideration of the nature and relations of the subject, or the consequences of the decision. It becomes, however, for a time the law: even when found untenable in principle and mischievous in application, it is not directly overruled: it may be questioned and cavilled at, but it is at last carefully distinguished by some immaterial variety of circum-

¹ *Bohtlink v. Inglis*, 3 East, 381.

stances from the one under consideration, and suffered to live on to be again cited as authority, and again gently disparaged and distinguished: thus more refinements are continually introduced, the principle is frittered away in subtleties or lost sight of in details, the rule becomes uncertain, and litigation flourishes, until out of a series of particular decisions the principle is again, by a process of generalization and analysis, detected and evolved.

All this it would be an easy, and not, perhaps, an uninteresting, task to show by a detailed examination of the several cases;¹ but it will be sufficient, and more in accordance with the plan of these essays, to indicate merely what seems to be the general result, illustrating it by one or two examples.

Whether by the terms of the charter-party the temporary dominion and possession of the vessel is conveyed to the charterer, or the use and service merely, is of course a question of construction; and that construction is to be made upon the whole tenor and effect of the instrument, and not upon any phrase or form of words separately taken.² Many charter-parties set forth in the commencement that "the owner hath let, and the charterer to freight taken, the vessel," &c., an expression which, unqualified, imports an actual demise; yet such a construction may be manifestly inconsistent with the tenor of the contract, regarded as a whole, and of course therefore with the real intention of the parties. On the other hand, the absence of these or equivalent words of demise raises an inference that it was the *service* of the vessel, and not the possession, which was contemplated in the bargain;

¹ In *Hutton v. Bragg*, 7 Taunt. 14, the question does not seem to have been carefully considered, and the report is inaccurate, in not taking notice that there were words of actual demise. In other respects the charter-party was an ordinary contract for carriage, yet it was decided that the owner had forfeited his lien for the freight, merely because the whole vessel was chartered. The decision is stated to have excited great surprise, and some alarm, in the mercantile community. In the next year, when three other cases were presented to the same Court for judgment on the same point, the principle of the judgment in *Hutton v. Bragg* was tacitly abandoned. Other cases since decided have still further weakened the authority of that case, so that it may be safely regarded as furnishing no longer a precedent.

² There are certain legal expressions, principally in the conveying of real property, to which a fixed and definite meaning and effect has been assigned by the law, from which the Courts are not at liberty to depart; but in all other cases the general rule of construction is that stated in the text.

yet the context may show that such an inference would be erroneous, and that a demise, though not distinctly expressed, must have been intended by the agreement. The insertion or omission of these words, in short, may aid the interpretation, but does not conclude it, as will be apparent from the following cases.

A charter-party, whereby "the owners granted and to freight let to the charterers, and the latter took to freight the ship," &c., contained covenants, on the part of the owner, that the ship should proceed in ballast to her outward port, should there *take in* a cargo from the agents of the charterers, should proceed therewith to one of three home ports, as she should be directed, and should *there deliver* to the charterer; and, on the part of the charterer, that *on such delivery* he would pay freight at a specified rate.¹ Now here it is evident that these covenants would have been utterly useless and unmeaning, if by the charter-party the vessel itself had been let; for why should the owner bind himself by a contract to take goods on board, or deliver them out; or why should the charterer make the payment of freight dependent on the condition of delivery, if by the charter-party the possession and control of the vessel itself were vested in the charterer, so as to give *him* the right of delivering. By another charter-party, the owner *granted* and to freight let, and the charterers *hired* and to freight took the ship, for a specific voyage out and home. The owner covenanted that the master should receive and stow on board a full cargo of such goods as the freighter should send alongside, which he should deliver to the freighter's agents at the outward port; that he should there receive on board from the same agents a homeward cargo, with which he should proceed to London, and deliver it to the freighter. The latter, on his part, covenanted (among other things) to pay "for freight *and hire* of the said vessel for such voyage a gross sum of £2600," the times of payment being independent of the delivery. Goods of third parties were taken on board and carried by the charterer, and for detaining these goods under a claim of lien for freight due from the charterer, an action was brought against the owner. Here the expressions of demise were stronger than before; the

¹ *Yates v. Railston*, 8 Taunt. 293.

freight "or hire" was a gross sum for the voyage; the charterer had himself underlet a portion of the stowage, yet the necessity of giving a meaning and operation to the *covenants* prevailed, and it was held by a majority of the judges, after elaborate argument and a careful review of former authorities, that the possession of the vessel did not pass to the freighter.¹ It is a general rule of construction, as was in a former dissertation observed, that effect shall be given, if possible, to *all* the clauses of an agreement. Now in these cases, by giving to the words of demise their full and literal import, the clauses as to delivery, &c. become not only inoperative, but inconsistent; whereas, by the other construction, whilst full effect is given to the covenants, the words of demise also receive an effective, though more limited interpretation, being taken to signify "the engaging of the *use* of such parts of the ship as are used for the stowage of goods."²

In another case,³ where the same question was raised, the charter-party contained no words of letting, yet it was admitted that a demise of the vessel itself might nevertheless be effectually raised by implication, if the general tenor of the agreement clearly and necessarily imported it, and the case was decided, therefore, not on the want of these words merely, but upon an attentive consideration of the whole charter-party. "There is nothing," said the Chief Justice (Abbott) in delivering the judgment of the Court, "either in its language or its object which imports that the merchant-charterer was to have the *possession* of the ship. The whole instrument contains matter of contract and covenant only." But that there may be a conveyance of the possession without express terms of demise is not left to inference merely; for there is the authority of a recent case directly establishing the proposition.⁴ It is unnecessary here to state the exact question

¹ *Christie v. Lewis*, 3 B. & B. 410. The Chief Justice (Dallas) dissented from this judgment, and adhered to *Hutton v. Bragg*, in the decision of which he had concurred.

² Per Barrough, *J. ibid.*

³ *Saville v. Campion*, 2 B. & A. 503.

⁴ *Newberry v. Colvin*, 1 Tyr. 55. The case had been otherwise decided in the King's Bench, and the judgment of that Court was reversed in the Exchequer Chamber. Some observations upon the judgment of the latter Court will be found in a subsequent note.

agitated in that case, or to set forth the many and complicated details of the instrument of charter-party. Enough appears for our present purpose in the following extract from the judgment delivered after argument in the Exchequer Chamber upon a writ of error, by Chief Justice Tindal. "In the first place, by the terms of the charter-party, the owners covenant 'that the ship shall, if required, be kept and continued in the service therein described during twelve calendar months, or such longer time as shall be necessary to complete the voyage.' Betham, on the other hand, covenants that he will receive and take the ship into his service for the term of twelve calendar months certain, and until the voyage be ended, paying to the owners for the use or hire of the ship at and after the rate of 25s. per ton, per calendar month, during the term of twelve calendar months certain, and till his return to the port of London and clearance, or up to the day of her being lost, captured, or last seen or heard of. But it was objected, on the part of the plaintiffs below, that this contract contains no word of express demise; and undoubtedly it does not. But even in a lease of lands, no such words are absolutely necessary; for in Coke on Littleton, 456, it is said, 'any words amounting to a grant are sufficient to constitute a lease;' and there are cases in the books to show that if a man covenants that A. shall have land for a term, rendering rent, or that the covenantor shall enjoy land, those words will amount to a lease. Now the present case approaches very nearly to those above referred to; for the owners do covenant that the ship shall be kept in the service of Betham for a certain time; Betham covenants that he will receive her into his service during that time, and will pay for the use or hire of her a certain freight. These, we think, are stipulations *equivalent in effect* to the actual demise of the ship. But, further, the whole of the ship is so far parted with, that it is thought necessary that Betham should covenant with the owners that they should be allowed to load, on the outward voyage, goods not exceeding in the whole 100 tons."¹

¹ See, on this subject, in addition to the cases here cited, *Tate v. Meek*, 8 Taunt. 280; *Trinity House v. Clark*, 4 M. & S.; the judgment in which last case is strikingly characterized by the clearness and strong sense of Lord Ellenborough. The whole of the cases were also passed under review in the argument in the case

The distinction being now, perhaps, as clearly defined as the nature of the thing admits, the effect of it may be stated shortly as follows :—Where there is an actual demise, such as to transfer the possession to the charterer, the *owner* is to be considered merely as a letter-out to hire of a vessel with its appointments, master and crew, for purposes of carriage; and his rights and obligations are those which are incident to that character only. He warrants to the charterer the sufficiency of the vessel and stores, and the competency of the commander and crew for the employment or adventure contemplated; but he contracts with him no relation as carrier, and incurs none of the liabilities of a carrier either to him or to other parties whose goods may be placed on board. For the recovery of the hire, usually and undistinguishingly termed freight, he has the ordinary remedies upon the personal obligation of the hirer, but he has no lien upon the loading of the vessel, having no legal possession, and consequently no power to retain. *The charterer*, under such a demise, becomes for the term of the demise the occupier, and for many purposes the owner, of the ship. He may underlet it, either in whole or in part, may put it up on general freight, or, in short, may employ it in any manner not inconsistent with the conditions of the charter-party. But if the letting be for a specified voyage he cannot change the destination, and, unless otherwise stipulated, he has no power to remove or suspend the functions of the master, under the *general* charge and governance of whom, as the servant and for the benefit of the owner, the vessel still remains. As regards

of *Small v. Moates*, 9 Bingh. 574. In that case, however, the charter-party expressly stated "that it was agreed and understood between the parties, that the ownership of the ship during the continuance of the charter-party should remain firmly and be fully vested in the owner, and that he should at all times during the said intended voyage and service have a full and complete lien upon the lading of the said ship, as well for all losses from the non-payment of any of the bills for freight, as for all arrears of freight, &c.," and the question being upon the lien, the Court held, that after so clear and unequivocal a declaration of intention, it was unnecessary to discuss whether the right of lien would or would not have followed from the relation in which the parties had placed themselves to each other by the other provisions of the charter-party. See also the case of *Dean v. Hogg*, 10 Bingh. 345, where the question was, whether a party of gentlemen who had hired a steamboat for a day's excursion to Richmond, had such an exclusive right of possession as to justify an assault in turning out an intruder.

other persons, whose goods may be carried, the charterer is the contractor, and the master is *his* servant in all that concerns that contract, as the shipping, conveying, and delivering of the goods. Conversely he has all the rights which an owner, as carrier, would have against the shipper, and amongst these, undoubtedly, that of a lien on the goods shipped for payment of the stipulated freight.¹ One question yet remains: suppose that in the course of her service under the charter-party damage be done by the ship to some other vessel, from negligence or unskillfulness in the navigation, who is to be responsible for the consequences of this mischief—the owner, by whom the commander was chosen and appointed, and whose general servant he is, or the charterer, to whose immediate orders and direction he was subject at the time of the misadventure? It has been decided² that the liability falls upon the owner, and satisfactory reasons may, perhaps, be assigned for such a decision. The principle upon which masters are made answerable for the misconduct or unskillfulness of their servants is this: the selection of the instrument employed is theirs; and policy requires that they should be considered as guaranteeing to the public the competency and trustworthiness of the person selected. In the case under consideration the master is chosen and appointed by the owner; the charterer has no part in the selection, and, as we have seen, no power to remove him from the command; he hires the master with the vessel, and must retain him as

¹ *Lewis v. Christie, ante.*

² *Fletcher v. Braddick*, 2 N. R. 182. The writer may, perhaps, be pardoned for saying, that as to the particular case here cited, neither his understanding nor his sense of justice acquiesces in the conclusion, unless it is to be *assumed* that the master retained the effective command in the navigation of the vessel, which fact, to say the least, is left doubtful. The *principle* underwent much discussion in the well-known case of *Laugher v. Pointer*, 5 B. & C. 547, upon which the judges of the Court of King's Bench were equally divided in opinion. The question there was, whether a person who had hired job-horses and a driver for a day was liable for an injury occasioned by the negligent or unskillful driving of the coachman so hired. Bayley and Holroyd, Justices, held that he was: the Chief Justice (Abbott) and Littledale, J., that he was not. The arguments on both sides are, as may be supposed, entitled to great attention and deference, yet, if it were not presumptuous to hazard such an opinion; the writer would venture to say, that the true principle and criterion of liability was not exactly seized, and hence, perhaps, it is that he has always felt inclined to assent to the arguments of the two first-named judges, and the conclusion of the others.

master, whatever his qualifications may be. Again, though subject to the control and direction of the charterer as to *the course of the voyage*, yet in the mere act of conducting and navigating the vessel he is independent altogether of his will. It is a matter necessarily left to his skill and discretion, and the manner in which the duty is performed is referable to his general fitness, with which, we repeat, not the charterer, but the owner who appointed him, is concerned. It is reasonable, therefore, that for the results of negligence or unskilfulness in the conduct of the vessel the owner should be answerable to strangers, as unquestionably he would be to the charterer himself. Yet the argument in support of a contrary conclusion is not without considerable weight. The injury is done in the course of a voyage undertaken by the charterer for his own profit. The commander of the offending vessel acts throughout that voyage under the directions, and is therefore immediately and ostensibly the servant, of the charterer. If by his misconduct in the execution of the orders so given injury be done to others, the person in the execution of whose orders, and for whose immediate benefit he was acting at the time, although entitled, perhaps, in turn, to his remedy against the original employer whose servant the wrong-doer is, is yet, according to the ordinary principles of law, and, indeed, in strict justice, directly liable to the party injured. In this reasoning, however, when narrowly examined, a fallacy will be found to lurk; because the injury arises, not from the execution of the charterer's orders, but from misconduct or unskilfulness in the *management* of the vessel with which the charterer, as we have said, has nothing to do. Moreover, the effect would only be a multiplication and circuitry of actions, ending at last in the same result; and as the owner is by means of the registry more easily ascertained than the temporary employer of the vessel, expedience also concurs in casting the liability at once upon the former.

Henceforth, then, unless the contrary be expressly indicated, the owner may be regarded, not as the letter to hire of the vessel, but simply *as a contractor to carry by the vessel*; and we might at once proceed to consider the nature and effects of such a contract, were it not that there is still one incidental topic which it will be convenient first to dispose of. The

freighter who stipulates for the use and room of the whole vessel, undertaking on his part to furnish a full cargo, is not bound to complete the loading with his own goods, but may, if necessary or convenient, put on board the goods of other persons, to be carried on such terms and to such places within the limits of his charter-party as may be agreed between him and them. Now it seems clear that in such case it is the charterer, and not the owner of the ship, who contracts with these third parties. The charterer has engaged to pay to the owner either a specific sum for freight, or, if the rate has been fixed at so much per ton of the goods shipped, has bound himself to furnish a full cargo. The sub-engagement with third parties is manifestly therefore for his benefit; the freight is paid to him, or on his account;¹ as regards the goods so shipped, the master is *his* agent to receive, stow, convey, and deliver; and consequently for the breach of any of these engagements, he, and not the owner of the vessel, is justly held responsible.

The proposition here stated seems so plain and reasonable, that it would be unnecessary to enforce it by authorities, had not an early case² been otherwise decided, on grounds thus stated by Chief Justice Lee, before whom the cause, which was an action against the registered owner for the loss of goods taken on board by the charterer, came on for trial. "The true consideration," he said, in his direction to the jury, "is whether by anything done by Crawford, who is confessedly the owner of the vessel, in chartering it to Fletcher, he has discharged himself as owner. Crawford considers himself as the governor of the ship, and covenants for the government of it during the voyage, and the ship was navigated by *his* master. Upon what foundation then is an owner chargeable but upon these two considerations—1st, the benefit arising from the ship, which is the equitable motive; 2dly, the having the direction of the persons who navigate it? and it is upon these two things taken together that the implied con-

¹ See *post*.

² *Parish v. Crawford*, Ab. on Sh. p. 19. The capital error of these early cases consisted in treating the registered owner as *prima facie* liable on account of his appointment of the master and general interest in the vessel. See the observations on the case of *Rich v. Coe*, in the 13th No. of this series, vol. 13, p. 391.

tract arises. Though Crawford has not that freight which the merchants pay for their goods, yet he has the benefit of the freight in general. With regard to Fletcher, what Crawford has done is only giving him a power to put goods on board. Therefore I think there is nothing upon this evidence that discharges Crawford as the owner of the ship."

But the question, rightly considered, was not whether Crawford was *discharged* from liability, but whether he ever became liable at all. It was a question of contract; if it be regarded as an *express* contract, it was clearly made with Fletcher, the charterer; if as an *implied* contract, then it was for the benefit of Fletcher, to whom the freight *for those goods* was payable, and he therefore was, reciprocally, the person to be charged. *Qui sentit commodum, sentire debet et onus*. Accordingly, in later cases, this decision has been tacitly over-ruled. Thus, in an action brought against the registered owners for the loss of goods shipped from Faro to London, wherein it appeared that the vessel had been chartered on a voyage from Falmouth to Faro and back to London, the charterers engaging to provide a full cargo from Faro, and to pay a stipulated price per ton, and that the goods in question had been shipped at Faro *by the master, with the consent of the charterers' agents there*, it was held by Lord Kenyon that the charterers were, with respect to the plaintiff (the shipper), the owners of the ship *pro hac vice*, that the defendants were not responsible to him, and that consequently the action could not be sustained.¹ The same point was determined in a subsequent case by Lord Ellenborough, and seems indeed to be now by general acquiescence established.²

In each of the instances last cited the agreement for shipping the goods seems to have been made with the master; the true question therefore was, whose agent was he in the transaction?³ And even if the master himself be the charterer,

¹ James v. Jones, Ab. on Sh. 20.

² Mackenzie v. Rowe, 2 Campb. 482.

³ Suppose the master to take goods on freight on board a ship wholly chartered, *without consent of the charterer and his agents*, and that the goods are lost or damaged, upon whom would the loss fall? We apprehend upon the charterer, if he subsequently adopted the transaction by receiving freight on any part of the goods

it will still be substantially the same ; viz., on whose account and for whose benefit did he act in taking the goods on board ? If he have an exclusive right to the use and room of that part of the vessel in which the goods are stowed ; if the freight be payable to him, or for his benefit (and *à fortiori* if the vessel itself have been let to him so as to give him the possession and control), the engagement to carry will be *his* personally, and he, not the owner by whom he was appointed master, will be responsible for the breach of obligations arising out of that engagement.¹

Conversely, the charterer, not the owner, is entitled to sue for the freight of goods so shipped ; but whether he can detain them by way of lien for his demand must be determined by the question whether he has *possession of the goods*. Now he has not, it is true, the occupancy of the vessel in which the goods are placed ; but inasmuch as they are committed to the charge and placed in the custody of the master, acting in that respect as his servant, it seems that he has the possession of the goods themselves, and therefore the *power* to retain them, which, as has been said, is the only question, the *right* to retain being clear and undisputed. It is no valid objection to this reasoning that the same goods are subject at the same time to the lien of the owner for the hire of the ship. As to him, the cargo found on board, and, as it were, warehoused

so shipped ; but if not, then upon the master ; certainly, however, not upon the registered owner.

¹ See the case of *Newberry v. Colvin*, 1 Tyr. 55. In that case, much stress seems to have been laid by the Court on the question whether the vessel itself passed by demise to the master. The clauses of the charter-party, and the actual relations thence resulting, were certainly not a little complicated, and no doubt the decision of that question materially aided the general interpretation ; but the writer conceives, with deference, that it was not *essential* to the conclusion, which seems to him to have depended entirely on the right of the master, as charterer, to *take in goods on his own account, and for his own benefit*. Again, in the argument, a point was made that the contents of the charter-party were known to the shippers ; but this he considers to have been *altogether immaterial*. It seems to have been intended to meet a possible objection that the shippers, in ignorance of the relation of the master as charterer, might have supposed themselves to have the responsibility of the registered owners, whose servant *primâ facie* the master is. But neither in the two cases of *James v. Jones* and *Mackenzie v. Rowe* does it appear that the shippers knew anything of the charter-party, and yet the charterer was held to be the contractor. If the owners did anything *actively to mislead* others, the question might be different.

in the vessel, is the charterer's cargo; his lien therefore is enforced against the charterer, and though paramount to, is not inconsistent with a like right in the latter, as against the shipper. Cloth found in the shop of a tailor is liable to be distrained by the landlord for rent; yet there is no doubt that the tailor also has a right to detain the same cloth until paid for work which he may have bestowed upon it.

And now, at length, we come to the main contract of affreightment, viewed as a contract for the carriage of goods for hire, and stripped of all accessory matter, for the purpose of examining in detail the obligations which it creates, as well on the part of the contractor to carry, whom we shall call *the owner*,¹ as of the merchant whose goods are carried, who will be spoken of under the name of *the freighter*.

The contract itself, when reduced into a charter-party, is to be collected from and governed by the terms of the instrument. Charter-parties may be, and in practice are, made in all varieties of form as suits the nature of the service or the convenience of the contracting parties: but the main particulars, and which may be considered as common to all, are these—the description of the parties, the name and tonnage of the vessel, the name of the master, and the projected voyage or adventure—covenants—on the part of the owner, that the ship shall be tight, staunch, and strong, and every way fitted for the voyage; shall be ready to take in the goods of the freighter on or before a day named; shall receive the same on board; shall sail with the first fair wind after a day also appointed to the port of destination (the accidents of navigation excepted); and shall there deliver the goods to the freighter or his assigns in as good condition as when put on board—on the part of the freighter, that he will load (a full cargo, or as may be agreed) within a certain number of days after the ship shall be ready for the reception of cargo, and unload within a given time after her arrival at the destined port; and that he will pay the freight and other charges at the rate, in the manner, and at the times set forth. A penal clause is usually subjoined, which though professedly binding as well the ship and cargo specifically as each of the contracting parties personally, to the performance

¹ For our present purpose it will be unnecessary to distinguish between the owner and the master as severally liable upon such a contract.

of their respective covenants, is practically useless; for the common law courts of this country, under the cognizance of which all special contracts fall, cannot, as has been before stated, enforce proceedings against either the ship or cargo *in specie*; and in personal actions against either party, when brought, as they invariably are, not for the penalty but for compensation generally for the breach of covenant, the sum expressed in the penal clause is not received either as the measure or as the limit of the damages.¹ In the maritime states of the Continent, from which it was borrowed, the clause had an operative meaning and efficacy, for in all other systems of law but our own, the proceeding *in rem* is admitted; but in English charter-parties it is an idle form and seems to be retained for no better reason than a mere adherence to precedent.

Upon these ordinary stipulations may be engrafted special clauses, restraining, qualifying, or extending, as may be deemed expedient; of which a few, the most important, and at the same time of most frequent occurrence, (for to enumerate the whole would be a vain and endless task,) will be selected for notice under the heads to which they respectively belong.

When there is no charter-party, the agreement by the merchant to ship, and by the owner to receive on board, is for the most part made verbally between the master or ship's husband and the merchant, and unless otherwise expressed, is understood as being on the terms announced in the hand-bills and advertisements putting up the ship to freight. The contract for carrying the goods so shipped, in consideration of a certain freight or hire, arises from the actual shipment by the one and the receipt on board by the other, and is evidenced by the bill of lading in which the terms and particulars of the engagement are embodied.

The bill of lading is the written acknowledgment of the master of the vessel that he has received from the shipper goods as described, to be carried to a particular destination, and there delivered to the parties therein designated. Subject to immaterial variations, it is in form as follows:

¹ See *Birley v. Gladstone*, 3 M. & S. 205; 2 Meriv. 401.

W. B. } Shipped in good order by A. B., Merchant, in and
 No. 1 a 10 } upon the good ship ———, whereof C. D. is
 master, now riding at anchor in the river———,
 [or lying in the ——— Dock, &c.] and bound
 for [here follows an enumeration of the goods shipped]
 marked and numbered as per margin; and are to
 E. F. } be delivered in the like good order and condition at
 No. 1—50 } ——— aforesaid (the act of God, the king's
 enemies, fire and all and every other dangers and
 accidents of the seas, rivers and navigations, of
 what nature and kind soever, save risk of boats
 so far as ships are liable thereto excepted) unto
 ———, he or they paying freight for the same
 at ——— per ton [or where there is a charter-
 party, as per charter-party] with primage and ave-
 rage accustomed. In witness whereof, I the said
 master of the said ship have affirmed to three bills
 of lading of this tenor and date; the one of which
 bills being accomplished, the other two to stand
 void. And so God¹ send the good ship to her
 destined port in safety. Amen.

C. D. Master.

Dated at London this 14th day of Jan. 1836.

This acknowledgment is given upon the shipment of all goods, whether under charter-party or general. By the charter-party the owner binds himself to receive and carry *such* goods as the freighter may send alongside. By the bill of lading the master charges himself with the actual receipt of *the particular goods* therein specified: in short, where there is no charter-party, it is the evidence of the contract generally; where there is, it is the evidence of the shipment merely.

From this general view of the form and substance of the contract, whether by charter-party or otherwise, a notion may be gathered of the different obligations created by it, sufficiently accurate for the purpose of classification and distribu-

¹ In some forms the phrases introduced by the piety or the superstition of the early mariners, to whom the service was one of real danger, are still preserved to a greater extent than in the precedent of the text. "Shipped by the grace of God, in good order, &c. 100 casks of tallow," is an expression hardly calculated to excite serious emotions.

tion, and we shall proceed therefore to consider them as they concern—1st. The shipment: 2dly. The carriage and delivery: 3dly. The payment of the freight and other charges.

And, first, of the obligations which concern the shipment.

1. The vessel designated in the charter-party cannot be changed without consent of the freighter; and the description of its character, as registered or British built and the like, is so far material that if loss accrue to the freighter, from confiscation or otherwise, by reason of the assumption of a character or privilege to which the vessel is not entitled, he will have a right to full reparation from the owner. 2. The description of tonnage serves of course as a guide to the charterer, and ought therefore to approximate as nearly as possible to the true capacity of the vessel, but it is not conclusively binding upon the owner unless designedly misrepresented with a fraudulent purpose.¹ It is usual to state the register tonnage and to add the qualifying expression "or thereabouts." By the French ordinance the limit of variation was fixed at one fortieth, for an error beyond this the owner being made responsible; and the same rule is introduced, with some qualifications, into the Code de Commerce. Molloy, a writer of no great authority, states that by usage the expression "thereabouts" is commonly limited to about five tons; but when it is considered that even with the perfect skill of modern times in the compression of light goods for package, there must still be great variation in the weight of articles in proportion to their bulk, the reasonableness of allowing an extensive, if not an undefined latitude to the description of burthen, will be at once apparent. 3. For the voyage expressed whether in the charter-party or in the advertisement of a general ship, after an agreement made, no other can be substituted, without the assent of the freighter, or in other words without a new contract. The same observation may be applied generally to all the stipulations of the agreement.

¹ *Hunter v. Fry*, 2 B. & A. 421. There are statutes prohibiting the carrying any number of passengers beyond a certain proportion to the tonnage of the vessel. Where vessels are employed as passage ships, the description of burthen in the charter-party is material, even though it may also be partly laden with goods. See *Bishop v. Mackintosh*, 3 B. & C. 556.

4. The freighter, it has been seen, binds himself to ship goods on board the owner's vessel for carriage. In the case of a general ship, where, as has been said, the agreement is commonly verbal, this undertaking of the merchant is satisfied by sending alongside goods of the kind and quantity specified at the time agreed, or (if none fixed) in such time before the advertised day of departure as may be reasonably sufficient for the proper stowage of the goods, regard being had to their nature and weight. The owner on his part binds himself to receive on board the goods to be shipped, and, taking as before the case of a general ship, his engagement requires that he should have his vessel ready for the reception of goods according to his public announcement; and that he should receive and load the goods, when brought in proper time, unless either they do not correspond with the agreement, or, (if not particularized in the agreement,) are liable to reasonable objection, as being, for example, improperly packed, or contraband, or of a kind likely to prove injurious, either to the health of the crew, or the safety and condition of the vessel, or of the rest of the cargo on board. A reasonable time, however, must be allowed for the taking in of the goods, and where several consignments are presented together, a fair discretion may be exercised as to the order in which they are received on board.

For the breach of these obligations respectively, the parties are mutually answerable in damages; but neither is bound to wait for the other to his own injury or inconvenience, and the merchant on the one hand, if the ship be not ready, is at liberty to seek another, and the owner on the other hand, if the goods be not ready, may take other freights and fill up his vessel as he can.

When the agreement is by charter-party the obligations to load and receive are more varied, and require therefore a more detailed examination. We will consider them, 1st, as they affect the freighter; and, 2dly, as they affect the owner.

1st. The covenant of the freighter is to furnish either an outward cargo, or an outward and homeward cargo, or (the ship being sent out in ballast) an homeward cargo only; the general obligation in all these cases being of course the same. A day is ordinarily fixed at which the vessel is to be ready

to receive her loading, and it is said that if she be not ready at the time appointed, the freighter may, if he think fit, withdraw from his engagement altogether, and despatch the goods by another vessel.¹ But this proposition seems to require some qualification. Time cannot be so *entirely* of the essence of the contract as that the loss of a single day would warrant the rescinding of it altogether, and although the merchant undoubtedly is not bound to delay his consignment to his own prejudice, yet surely a reasonable allowance should be made for impediments perhaps unforeseen, and the rather, as if loss be actually incurred by the delay, there is the personal responsibility of the owner for making it good. What has been said thus far regards of course the loading in the home port. As for the covenant to furnish a cargo in an out port, if no time be specified, and no condition introduced, the freighter will be bound to fulfil his engagement at all events, unless the delay be so manifestly unreasonable that it could not have been contemplated by either party; in which case, if attributable to the fault of the owner, though not perhaps strictly released, the freighter may safely venture to disregard it. But as punctuality and expedition are the life of commerce—as the calculations of a profitable consignment depend mainly on the probable state of the market at the time of its expected arrival—it is a prudent and not unusual practice for the freighter to stipulate that unless the vessel arrive at the out port, or be ready for the reception of cargo at a given time or within a given range of time, it shall be at the option of his agents there to load the vessel or not, as they shall deem expedient; the condition itself, however, being sometimes qualified by a proviso inserted for the benefit of the owner, that the delay have not arisen from inevitable causes of detention.

One or two examples will sufficiently illustrate these special stipulations. The master of a vessel bound for Madeira covenanted by charter-party that after the discharge of cargo at that island he would proceed to Winyaw in South Carolina, and there stay forty running days if not sooner despatched, and load his ship with such rice and other goods as the merchant should tender, the merchant

¹ Ab. on Sh, 179.

on his part agreeing to pay freight for the same at the rate of 4l. 10s. per ton ; on condition, however, "that if the said ship should not be arrived at Winyaw aforesaid by the 1st day of March next ensuing the date of the said charter-party, then and in such case *it should be at the option of the merchant*, his factors, or assigns, on the said ship's arrival at Winyaw, either to load the said ship on the terms aforesaid or not ; or at the then current freight given to ships loading at Winyaw for the voyage aforesaid ; or to refuse the said ship entirely ; *so always that* such intention of the said merchant, his factors or assigns, was declared to the master of the said ship within 48 hours after his application to the factors or assigns of the said merchant at Winyaw."¹ The question raised on this proviso, and the decision of the Court, which are not material to the subject now under consideration, will be noticed hereafter.

Another charter-party, whereby it was agreed that the vessel should sail for Sydney in New South Wales, where having discharged her cargo she should proceed to some port on the coast of Malabar, and there take in a home cargo from the freighter's agents, with the usual covenant on the part of the freighter to load a full cargo, and to pay freight at a certain rate, contained further a proviso "that in case the vessel should not be arrived at her port of lading and be ready to take in cargo on or before the 28th day of November, (unless she should have been prevented by stress of weather or other unavoidable impediment,) then it should be at the option of the freighter to load her with the home cargo or not as he might think proper." In fact, the vessel did not arrive at the port of loading on the Malabar coast until some time in the month of January, whereupon the freighter refused to put a cargo on board ; and an action being brought by the owner for the breach of his covenant in this respect, the question raised by the pleadings was, whether in the words of the exception to the proviso, the vessel had been prevented from arriving by stress of weather or other unavoidable impediment. A verdict was found for the defendant (the freighter), and it will not be out of place to observe here, that to the words "unavoidable impediment,"

¹ Shubrick v. Salmond, 3 Burr. 1637.

the Lord Chief Justice Tindal gave a liberal construction, directing the jury that although undoubtedly importing primarily something of the *vis major*, yet in their present application they might be fairly considered as denoting such an obstruction as a man could not by any reasonable degree of foresight have prevented, and did not therefore demand from the owner or master greater efforts than were usual and in the ordinary course.¹

Other conditions of the like nature may be exacted by the freighter, and conceded, with or without qualification, by the owner. As where the *St. Patrick* was chartered to sail from London in ballast to Cadiz, remain there fifteen days, and thence proceed to Guyaquil or elsewhere, as directed; there to lay one hundred and twenty running days for cargo; and the charterers agreed that at such port of destination "they would send alongside the said vessel all such lawful goods as they might think proper to ship," and despatch her to her home port; a proviso was added, that "*in the event of the non-arrival of the ship or vessel called the Grant, Hogarth master, (chartered and then on her voyage to St. Blas de California) at that port*; then, in such case, that charter-party and every clause of agreement therein contained should, in case no shipment should have been made under it, cease, determine, and be utterly void to all intents and purposes whatsoever." The *Grant* did arrive at the out-port, but not until long after the expiration of the lay-days: no cargo was furnished to the *St. Patrick*; and an action being brought by the owner, it was held, that giving to the terms of the proviso a fair and reasonable interpretation, the charterers were released from their engagement, and that the action could not be sustained.²

But if the freighter be really desirous of making the arrival of the vessel, the delivery of the outward cargo, or any other act or event, a condition precedent to the covenant on his part to furnish a cargo, he must be careful to express the intention clearly and unambiguously; for the Court will not strain the

¹ *Granger v. Dent, Lloyd & Welsby's* M. C. 270. See also *Shadforth v. Higin*, 8 Campb. 385.

² *Soames v. Lonergan*, 2 B. & C. 564; but see *Deffel v. Brocklebank*, 4 Price, 36.

primary import of the terms employed in order to raise such a condition by implication from the agreement. In an action of covenant brought by the owner of the ship *Concord* against the freighters, it appeared that by the charter-party the vessel was to proceed by Cagliari to Naples, and there *make a delivery* of her outward cargo, *and having so done*, she was to take on board a homeward cargo, and proceed therewith to London. The freighters covenanted that they would find and provide, as they did warrant and assure to the plaintiff, a full and complete homeward cargo, and they undertook to pay freight by the ton, and that 1750*l.*, part thereof, should be paid on delivery of the outward cargo, which was to be considered as earned and due for outward freight; and one of the questions raised was, whether the seizure of the outward cargo by the Neapolitan government, which prevented the delivery as stipulated, discharged the freighters from the obligation, which their covenant otherwise would have thrown upon them, to find and provide a homeward cargo; the freighters insisting that, as by the words of the covenant on the part of the owner, *he* would not have been bound to receive a loading if prevented from delivering the outward cargo, so, reciprocally, they could not be held bound to furnish one. The Court, however, decided that neither the premises nor the conclusion was well founded. "The covenant from the freighters," said Lord Ellenborough in delivering the judgment, "contains no words which import to make the delivery of the outward cargo a condition precedent; they covenant generally and without qualification, that at Naples or Gallipoli they would find and provide, as they did thereby warrant and assure to the owner, a full and complete cargo. It is contended, however, that from the wording of the owner's covenant, this condition precedent is to be implied; but it does not appear to us that the words 'having so done,' would have been any excuse to the owner for not taking in the cargo, and admitting that they would, it by no means follows that they would afford one to the freighters."¹

In the absence of any such conditions, nothing will release the freighter from the performance of his covenant, which

¹ *Storer v. Gordon*, 3 M. & S. 308; and see also *Fothergill v. Walton*, 8 Taunt. 576.

has not the effect of dissolving and annulling the engagement altogether. Now, in an earlier number of this series¹ it was stated that a contract is not dissolved by an impossibility arising subsequently; or, which is nearly the same thing, that he who creates a duty or charge *by his own contract* is not excused from the consequences of non-performance, even though the fulfilment were prevented by inevitable circumstances over which he had no control; and this upon the principle that the contract being a voluntary act, the party entering into it must be understood as subjecting himself to all contingencies not expressly excepted. Accordingly, as was the example there cited, the freighter of a ship, who had covenanted to send a cargo alongside at a foreign port, was held not to be discharged from his covenant, although on the arrival of the vessel at the port, it was found that an infectious disorder was raging there, and that, in consequence, all intercourse with the shore was prohibited.² By what acts or events the contract *may* be dissolved, is a question affecting of course *all* the engagements comprehended in it, and will, therefore, be more fitly discussed hereafter: as applicable to the present subject, it may be stated generally, that if after the making of the contract and before the departure of the vessel hostilities should be commenced between the state to which the ship or cargo belongs and that to which they are destined, or if by the government of the former the exportation of such cargo should be prohibited, the freighter is not bound to load, and if he has already done so, may and must unlade his goods; but that a mere embargo or prohibition imposed by a foreign government does not discharge him from an agreement to load, or, to speak more precisely, does not release him from the consequences of not loading.

When the freighter has stipulated for the use of the whole vessel, or of the whole with the exception of some trifling portion reserved for the owner, the amount of freight to be paid is either independent of the cargo, or it is estimated according to the weight or number of the goods to be shipped. In the former case it is evidently immaterial to the owner what amount of cargo is placed on board so that

¹ Vol. ii. p. 249.

² *Barker v. Hodgson*, 3 M. & S. 267.

there be enough to furnish a security for his freight, and the undertaking of the freighter therefore is general—to provide a cargo, or to send alongside such goods as he or his agent shall think fit, and the like; but upon the latter mode of estimating freight there is almost invariably a covenant on the part of the freighter to furnish and send alongside “a full and complete cargo,” which expression is construed to signify such a number of tons of goods as the ship is capable of containing without injury, and this, without regard to her burthen as specified in the charter-party.¹ It is usual, moreover, to state in general terms the *sort* of cargo to be put on board, as a full and complete cargo of Muscovado sugars, &c., or of hemp, flax, hides, and tallow, or the like; and as the rate of freight varies according to the proportion between the weight and the bulk of the goods, and other circumstances, it is of course material that the nature of the cargo shall correspond as nearly as may be with the description in the covenant. Thus it would clearly be a breach of a covenant to furnish an assorted cargo) that is to say, a cargo of various articles so assorted as to make a convenient and beneficial loading) if the vessel were filled exclusively with one or two only of the kinds enumerated. In a case, however, where the charter-party was loosely worded, the owner covenanting to receive on board, and the charterer to provide and furnish for loading “a full and complete cargo, consisting of copper, tallow, and hides, *and other goods*,” Lord Ellenborough held, that although the intention might have been that copper should necessarily form a part of the cargo, yet the covenant, as expressed, left a latitude to the freighter, and was substantially performed by the loading of as large a quantity of tallow and hides alone as the vessel could take on board.²

With a like regard to the fair remuneration of the owner, and the presumable intention of the contracting parties, the goods themselves must be packed properly and according to the approved usage of the port of loading, so as to admit of the stowage of as large a quantity as possible. By a charter-party the freighter covenanted to furnish a full cargo at Charleston or New Orleans, as he might choose, paying

¹ *Hunter v. Fry*, 2 B. & Ald. 421.

² *Moorsom v. Page*, 4 Campb. 106.

freight for cotton in round bales 8*d.* per pound, and in square bales 2½*d.* per pound: the ship being unable to obtain a cargo at Charleston was loaded at New Orleans with cotton in square bales, compressed as it came from the grower: it appeared, however, that it was the invariable practice at that port, though not at Charleston, to recompress by means of a steam engine erected for the purpose on the quay, all bales of cotton brought down to be shipped for exportation, unless, indeed, the vessel were unable to procure a full cargo, in which case the process would be unnecessary. In the present instance there was not a full cargo even of bales uncompressed, and the owner was held entitled to recover the difference between the freight on the cargo actually shipped and what would have been payable had a complete cargo been loaded of *steam-compressed bales*.¹

Further, the goods themselves must be "lawful goods," and so the covenant commonly, though unnecessarily, expresses; that is to say, the freighter must put on board no prohibited or uncustomed goods, so as to expose the vessel to the risk of forfeiture or detention.

It is almost unnecessary to add, that in tendering the cargo for loading, the freighter or his agent cannot insist on a deviation from the terms specified in the charter-party, and that the refusal to load, except on condition of such an alteration, is equivalent to an unqualified refusal, and a breach therefore of the covenant to furnish a cargo. Accordingly, where the freighter's agent at Jamaica required the master to sign bills of lading at a rate of freight lower than that stipulated in the charter-party, and on his refusal to do so withheld the shipment, the freighter was held answerable on his covenant, as if no cargo had been tendered at all.

Lastly, the freighter, as we have seen, binds himself by his covenant to complete the loading within a given time. The days during which a vessel lie for the reception and delivery of cargo are termed lay-days, and in the river Thames are said to signify by the custom of London working days, exclusive, that is, of Sundays. It is usual, therefore, in the charter-parties to specify them as so many "working" or "run-

¹ *Benson v. Schneider*, 7 Taunt. 272.

ning" days; and as the detention of the vessel beyond the stipulated time is of course detrimental to the owner, the freighter is held to the strict performance of his engagement in this respect, so that if the ship be delayed by him beyond the period assigned, he is answerable to the owner for this delay, or as it is technically called "demurrage" [*demeurage*]. But as any calculation of the precise time within which the loading may be completed is necessarily uncertain, it is the practice to provide in the charter-party for an extension of the original time on payment by the freighter of a certain sum for each day's detention after the expiration of the lay-days, and the sum so payable has, by a very natural metathesis, also received the name of demurrage. Circumstances, however, may occur, which render even the extended period insufficient, and in that case the owner will be entitled to such compensation for the further protraction as will indemnify him for losses directly resulting from it. A like stipulation is generally made as to the period of unloading, and as the legal consequences are in both cases the same, and the sum claimed by the owner in respect of detention beyond the lay-days is one of the charges upon the freighter at the expiration of the voyage and the delivery of the cargo, it will be convenient to consider this whole subject hereafter under a distinct head of "demurrage," when we come, in the third stage of our inquiry, to treat of the obligation of the freighter to pay these charges.

We proceed, therefore, secondly, to the obligations concerning the shipment as they affect the owner.

1. When the vessel is *wholly* chartered to the freighter, the owner is bound to leave him the exclusive use of the space within it for the purposes of cargo. He cannot, therefore, without his consent, take on board, either himself or by the master, goods of any other person for carriage, and if he do so, is liable to an action at the suit of the freighter either for damages, if the space allotted to him have been unduly filled to his disadvantage,¹ or, if he chose to adopt the con-

¹ It is evident that even where the freighter cannot or does not choose to occupy the whole space with goods of his own, the owner or master has no right to fill it up without his permission, as possibly the goods so carried might enter into injurious competition with those of the freighter at the market to which they are consigned.

tract, for the amount of freight so earned. Indeed, as it has been already said, the master, in thus taking other goods to freight, will be presumed, unless the contrary distinctly appear, to have acted on behalf and for the benefit of the charterer, and will be held accountable to him accordingly.

Nor can either the owner or the master of a vessel wholly chartered place on board goods of his own, or to be carried on his own account, without the special permission of the freighter; and although in one case Lord Ellenborough seemed to think, and so directed the jury, that such a privilege claimed by the master might, to a reasonable extent, be supported by proof of general usage, and might be taken as an implied qualification of the generality of the charter-party, yet such a doctrine cannot but be considered as both questionable in principle, and of dangerous tendency in practice.¹ When claimed or required, the privilege ought to be, and commonly is, reserved by express stipulation in the charter-party.

The assertion of a writer on maritime law,² that if the freighter having stipulated to load a full cargo decline or be unable to furnish more than a partial one, the owner or master *may* annul the contract, and even unlade such goods as have been placed on board, seems to be as untenable in law as it would be mischievous and absurd in practice.

2. The owner is bound to have the vessel ready for the reception of cargo, and to receive it on board according to the terms of his engagement. If the covenant on his part be absolute, he must tender his vessel for loading at the place appointed, even though the covenant on the freighter's part be optional, and he have reason to suppose that no cargo will be furnished. Of this the case before cited of the vessel chartered for Madeira and Winyaw, in South Carolina, affords a plain example. The day fixed for the arrival at Winyaw was the 1st of March; after that time the freighters' agents

¹ The case alluded to is that of *Donaldson v. Forster*, mentioned in *Ab. on Sh.* 209. One of the special jurors, it seems, dissented from his Lordship's doctrine, and could not be prevailed upon to concur with the rest, so that no verdict was pronounced. It would be thought a strange custom for the driver of a coach, hired for a job, to set up, that he was entitled to the use of the inside pockets for himself.

² *Molloy*, book ii. ch. 4, s. 3.

might or not, at their option, accept the ship for a cargo : the master having been unavoidably delayed, and finding it impossible to reach Winyaw by the 1st of March, directed the voyage elsewhere, and pleaded the impossibility in answer to an action brought by the freighter for not tendering the vessel for a cargo at Winyaw according to his covenant ; but it was held, as may be supposed, that these facts constituted no defence, and that he was bound to have sailed thither, so as to give the merchant an opportunity of loading the vessel if he thought fit.

3. If a cargo be not ready at the time appointed, the owner is not *bound* to wait beyond the specified number of lay-days, unless he has agreed by the charter-party that the freighter may keep the vessel on demurrage for an extended term. It is, however, the usual and prudent course for the owner, if a moderate delay only may be anticipated, to wait the convenience of the freighter, trusting to his personal liability to pay the loss and charges occasioned by the detention.

4. The manner in which the shipment of goods, whether under charter-party or general, is made, varies with the usage of particular ports ; the conveyance from the quay or wharf to the vessel being sometimes at the charge of the freighter, sometimes at that of the owner. The responsibility of the owner commences of course from the time at which the goods are considered as being under his charge, and in all cases, when once on board, the owner becomes immediately answerable for their safety, and is bound to make good losses which may happen, without fault on his part, from theft or violence, whilst the vessel is lying along the quay or in the river.

5. The business of taking in and stowing the goods belongs to the master, and for any accident which may happen in so doing he or the owner is responsible to the shipper. In stowing care must be taken to provide proper dunnage (pieces of wood so disposed as to prevent undue pressure of casks, &c.), and to arrange the several articles as may best preserve them from injury, and least interfere with the free working of the vessel.

6. It is usual to obtain a receipt for all goods, as they are shipped, signed by the mate or other person in charge. This receipt is the foundation of the subsequent bill of lading, and

no prudent master will give a bill of lading without the production and return of the receipt. When the lading is complete, the master formally signs, and it is an indispensable part of his duty to sign, bills of lading, consisting always of three, and not uncommonly of four parts, of which he retains one for his own security, and delivers the others to the freighter. In the making out of this important document, the directions of the shipper, or rather of the holder of the receipt,¹ are to be followed as regards the parties to whom the goods are to be deliverable, and the master is not bound by the description therein given of the goods as to quantity or quality further than as both are indicated by the exterior appearance, or the representations of the shipper; though for greater security in this respect, it is a customary precaution to add to the general description some qualifying words, as "contents unknown," or the like.

And so much for the obligations resulting from the contract of affreightment as they concern the shipment: in our next they will be examined as they concern the carriage and delivery.

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¹ *Craven v. Ryder*, 6 Taunt. 433.

ART. V.—COSTS IN TRESPASS TO REAL PROPERTY.

AN important and unexpected effect of the new Pleading Rules, (unexpected at least by the profession generally, though we may not say by the learned persons who framed them,) has been the introduction of a new law of costs, in cases of petty trespass to real property. To make the subject intelligible to our readers, it is necessary to state shortly the operation of the several statutes relating to it, as they stood limited by the authority of the decided cases, before the new rules took effect.

The 43 Eliz. c. 6, in the first place enacted, that if in *any personal action*, to be brought in any of the Courts at Westminster, *not being for any title or interest in lands, nor con-*

cerning the freehold or inheritance of any lands, nor for any battery, it should appear to the judges of the same Court, and be so signified by the justices before whom the same should be tried, that the debt or damages to be recovered therein should not amount to the sum of 40s., in every such case, the judges or justices before whom such action should be pursued should not award to the plaintiff any more costs than the sum of the debt or damages so recovered should amount to, but less at their discretion.

The effect of this enactment, as construed by the cases, was to preclude the plaintiff from having judgment for a greater amount of costs than damages, in all cases of trespass to real property except those included in the excepting words which we have marked in italics, where the jury found less damages than 40s., *and* the judge so certified to the Court out of which the record came. In the absence of such certificate, the plaintiff was entitled to full costs. But as it was found that this provision was inadequate to its object—the repression of expensive litigation for petty injuries, the stat. of the 22 & 23 Car. 2, c. 9, was passed, which, “for prevention of trivial and vexatious suits in law, whereby many good subjects of this realm had been, and were, daily undone, contrary to the intention of the act of Queen Elizabeth,” enacted, for making the said law effectual, that in all actions of *trespass*, assault and battery, and other personal actions, wherein the judge at the trial of the cause should not find, and certify under his hand upon the back of the record, that an assault and battery was sufficiently proved by the plaintiff against the defendant, *or that the freehold or title of the land mentioned in the plaintiff's declaration was chiefly in question*, the plaintiff in such action, in case the jury should find the damages to be under 40s., should not recover or obtain more costs of suit than the damages so found should amount to; and if any more costs should be awarded, the judgment should be void. The obvious intention and plain construction of this act was, to deprive the plaintiff of costs of increase in the same cases of trespass provided for by the statute of Elizabeth, not (as under that statute) *if* the judge certified in favour of the defendant, but *unless* he certified in favour of the plaintiff. It made, in fact,

the whole title of the plaintiff to costs, even in the excepted cases of the former statute, to depend upon the certificate of the judge in his favour: in cases of trespass *not* falling within those exceptions, it barred the plaintiff of costs absolutely and irremediably. Such, we say, seemed the plain construction of the law. But the Courts forthwith set about evading it; and by the constraining force of successive decisions, at length succeeded in restricting its beneficial operation altogether to the first class of cases of trespass we have just referred to—those, namely, falling within the excepting words in the statute of Elizabeth, and as to which that statute was wholly inoperative. And further, they made the right to costs to depend, not on the certificate of the judge, but on the terms of the record, wherever it could be collected from them that the case did not fall within the statute, as judicially interpreted. So that, wherever there was a special plea to an action of trespass to real property, whatever its nature, which was found against the defendant—nay, even where it was found for him, but an issue of not guilty on a new assignment was found for the plaintiff (which might be by reason of the slightest excess), the plaintiff was held entitled to full costs; because, said the Court, the record must show, in every such case, either that the title or freehold of the land *did* come in question, in which case a certificate is *superfluous*, or that it *could not*, in which case the statute does not give the power of certifying.¹ The Courts, in some later cases, made one or two attempts to escape to a sounder construction, but in vain: and the consequence was, that scarcely in any case of trespass whatever, unless there was no plea on the record but that of *not guilty*, which might or might not put the title or freehold in issue—a point which could not be ascertained otherwise than by the certificate of the judge—could a defendant have the benefit of the statute: the very cases most requiring its application, those cases, namely, of trivial and temporary injury, in which no *bonâ fide* question of title could arise, being effectually excluded from its benefit, wherever the defendant had any excuse to plead for the commission of it. And where he had *none*, the certificate of the judge would ex-

¹ It is not necessary to specify the cases; they are collected in Hullock on Costs, p. 85, *et seq.*, and 1 Saund. 300, note (f).

clude him as effectually. For, by the subsequent enactment of the 8 & 9 W. 3, c. 11, s. 4, the plaintiff was enabled to recover full costs of suit, wherever the presiding judge should certify that the trespass was wilful and malicious.

Thus the law stood, too strongly established by a long course of decisions to be questioned, when the new rules of Hilary Term, 1834,—relating to *pleading*, not to *costs*,—came into operation. They provided that thenceforth, in trespass *quare clausum fregit*, the plea of *not guilty* should operate as a denial that the defendant committed the trespass alleged in the place mentioned, but *not* as a denial of the plaintiff's possession, or right of possession, of that place, which, if intended to be denied, must be traversed specially. The consequence is, that the small *frustum* of the statute of Charles which was left in operative existence is annihilated; for upon the plea of *not guilty*, the freehold or title *cannot* henceforth come in question, and therefore, according to the cases, the statute is not applicable. And so, accordingly, the Court of Exchequer has decided;¹ admitting, at the same time, that all the mischief is thereby let in against which the act of parliament was directed. It was intimated by one of the learned judges on that occasion, that there might possibly still remain a case in which the statute might apply—namely, where there is a plea denying the plaintiff's *possession* of the close, in which case there might be room for doubt, whether the title or freehold came in question. But as this is a doubt which would be at once settled by a judicial determination, it abates nothing from the injurious effect of the new law.

Some compensation, however, has been afforded by another decision of a very learned judge on the construction of the same rule.² To a declaration in trespass for breaking and entering the plaintiff's close and taking away his goods, the defendant pleaded *not guilty*, and that the goods were not the property of the plaintiff. The jury having found for the plaintiff, with 5s. damages, the judge certified under the statute of Elizabeth to deprive him of costs. The question was, whether he had power to do so; and Mr. Justice Coleridge, after consideration, and, we believe, after conference with

¹ Hughes v. Hughes, M. T. 1835; not yet reported.

² Smith v. Edwards, Trin. & Mich. T. 1835; not yet reported.

some others of the judges, decided, that as the pleas *could not* any longer put the title, interest, or freehold in land in issue, the action could not be considered as being "for any title or interest in lands, or concerning the freehold or inheritance of any lands," within the excepting words of the statute of Elizabeth; that therefore the plea which took the case out of the operation of the statute of Charles brought it within that of the former act, and gave effect to the certificate. The new rule, therefore, while it operates as a virtual repeal of the act of Charles, extends, also, in some degree the remedy given by that of Elizabeth: for the established interpretation of the two acts taken together had been, that the plaintiff got his full costs in all cases of trespass except those deemed by the Courts to be within the statute of Charles 2, or those of William 3. It is, nevertheless, well worth the consideration of the profession, whether some declaratory law, giving full effect to the beneficial purposes of the legislature, is not almost a necessary consequence of the change operated by the new rule, which, though not so unlimited in its extent as it was at first apprehended, is yet so far prejudicial, that it substitutes a varying *discretion*, which seldom or never will act as a preventive of vexatious litigation, for an uniformly applicable law.

W.

ART. VI.—ON THE PRESENT STATE OF CRIMINAL LEGISLATION
AND JURISPRUDENCE IN GERMANY AND SWITZERLAND.¹

THE progress of legislation in every country is in harmony with that of the civilization and morality of the people, with the state of science, and with the political relations of the state. The more a people is advancing in civilization, the more those restrictive laws will be removed; which sprung in former times from feudalism, from the domination of a few privileged classes, or from the belief that the people ought to be treated as minors and could be kept in order only by fear. The greater

¹ Translated literally from a paper written for this work by Professor Mittermaier of Heidelberg, President of the Baden Chamber of Representatives, to whose valuable works on criminal law we have so frequently had occasion to refer.—Edit.

the morality of a people, the more it will keep sacred the ties which unite families, and the more rigorously it will protect public order and security. The more the sciences are cultivated, the more the nature of right and the duties of government have been examined, so much the more will legal enactments gain in clearness and justice. Germany being now *par excellence* the country of science and theory, we cannot be surprized if the belief has arisen there that principles properly belonging to science ought to be fixed by legislation ; and hence has sprung up a partial view of codification, requiring codes of laws which are to contain all legal definitions and rules of law, and the decision of every possible case ; in short, the principal virtue of a code was placed in its completeness. Thus our codes resembled that project which appeared last year in England in the " Report on Criminal Law," and was severely criticized in the Law Magazine (Vol. XIII. p. 1—59) ; especially the Prussian Landrecht and the Bavarian Strafgesetzbuch. A great change, however, has taken place in Germany in this particular within the last few years ; but in the present article we will confine ourselves to criminal legislature and criminal law, continuing our view from the close of the article published in Vol. XI. p. 1, of this Journal. There can be no doubt that much progress has lately been made in Germany in our political relations ; constitutions having been founded since 1831 in several of our states, through which public life has received new impulses, and the law has received a firmer basis. A greater respect has begun to be paid to public and personal liberty, and new guaranties have been given to the constitutions. Efforts have been made every where to impart greater publicity to legal proceedings ; severe and inappropriate punishments, such as whipping, have been abolished ; and in the universally felt necessity for mitigation, the state of prisons was also improved. It is true that during the same period many things in our political condition have apparently grown worse. The agitations of 1831 have brought parties into a more hostile conflict ; institutions and governments have been attacked with passionate violence, and the governments, in their turn, becoming alarmed at the progress of revolution, and consequently mistrustful of every proposition which might impart new vigour to popular life,

have refused to make those concessions which they had been willing to make before that period. Thus, too, it happens that many who previously had raised their voices in favour of publicity of trials and the liberty of the press, are now opposed to these, or at least declare their introduction to be inexpedient at this moment. Hence, again, the governments are alarmed lest the privileges of the crown might be limited: they also now look with alarm on trial by jury, and are endeavouring to limit judges so as to render acquittals more difficult, and hope by severe laws against state criminals and political associations, to remove the danger which seems to threaten them. Thus public life has in many parts of Germany been retarded by fear. But in the mean time science is still advancing, and the victory of justice and truth is still certain. All that is wished is to go on with moderation—that reforms should be slow, and existing institutions not suddenly overthrown. In almost every state new laws are preparing or actually promulgated. Thus, in Austria, a plan for new laws regarding bills of exchange, and another for a criminal code, have been drawn up. In Prussia, an important law was published in 1833, concerning civil procedure, in which the principle of oral pleading and even a kind of publicity have been admitted. In Hanover a new project for a criminal code was laid before the states in 1835. *The debates¹ on this project are remarkable, as they show the difficulty of debating on a complete code of criminal laws in a large mixed assembly, in which many who have had no legal education take part, and where points are often decided by a majority of votes, in such a manner as not to be in harmony with the rest.* The Hanoverian plan follows the Bavarian legislation, except that it is simpler and leaves more to the determination of the judge. A similar project was laid before the states of Bavaria in 1831, which has been well developed by the state counsellor Von Sturzen of Munich.

Notwithstanding the long duration of the session, the project was not taken into consideration, nor was any thing said

¹ An account of the debates of the two Hanoverian chambers on this code has been given by Zachariä of Göttingen, in the "*Neue Archive des Criminal-rechts*," vol. ii. part 2, No. xi.

of it at the meeting of the chambers in 1834, in consequence of which the criminal code of 1824 is still in force; a code so severe that the king is often obliged to mitigate its rigour. A law against arson, however, was passed in this session, which was rendered necessary by the frequent practice of people setting fire to their own houses, after they had insured them above their value.

In the kingdom of Saxony, too, a project for a criminal code is preparing. At the last meeting of the chambers of that country (1834—1835) some remarkable criminal laws have been passed, viz. one of the 8th February, 1834, on carnal sins, (*delicta carnis*): one of the 27th February, 1833, against infringements of regulations concerning tolls and taxes; one of the 14th February, 1835, a mutiny law: and one of 4th January, 1835, which abolishes various unsuitable formalities regarding the execution of criminals.

In the grand-duchy of Baden the legislative commission had drawn up a project for a system of criminal procedure, based on publicity. It also introduced a sort of public prosecutor, and endeavoured to combine the accusatory mode of proceeding with the inquisitorial.¹ The project has not yet been laid before the chambers, as the government considered it desirable to present a project for a criminal code at the same time; and the legislative commission is actually engaged in the preparation of such a project to be laid before the chambers in 1837. In the meanwhile a great step has been taken in the last session of the Baden chambers towards the introduction of an improved system of prison discipline, the sum of 100,000 florins having been granted for the erection of a new building in the penitentiary at Brückshal for female convicts, with directions that each prisoner should be confined at night in a separate room.

In Wirtemberg a new project for a criminal code was completed in 1832; but many objections having been made against it by the Courts of Justice, a new commission was appointed, whose project was laid before the Chambers last year, and is to be taken into consideration during this. This project being the latest result of legislative inquiry in

¹ The distinction is explained, 11 L. M. 18.

Germany, deserves general attention. It contains many excellent provisions, and the punishment of death is confined to high treason, personal attacks on the king, the highest grade of rebellion if attended by murder or arson, murder, and the highest grade of arson. It is very severe against all crimes committed against the state, whilst at the same time the definitions are so vague as to threaten public liberty. Thus, for instance, by article 132, propagation of principles endangering the existence of the state, if the propagation of such principles has been pre-concerted with others, is to be punished by six years' confinement in the House of Correction. The same punishment is awarded to the propagator of seditious writings. A timid judge will be inclined to call that seditious which a man of calm judgment will consider insignificant. Article 159 threatens punishment to every participant in a political association formed without the sanction of the government. The punishment of personal chastisement is not particularized in this project; but in certain specified instances, whipping is to be inflicted, coupled with confinement in the house of correction. In all cases of imprisonment, a *minimum* and *maximum* are fixed, between which the judge is left to mete out the quantity of punishment. Thus, for instance, the *maximum* of punishment for coining (Art. 195) is eight years' confinement; and manslaughter (Art. 229) is punished with from ten to twenty years confinement; rape, with confinement for life if death should ensue through the injury, and, in the lowest degree, with confinement of from four to ten years. Every crime in this project is defined; *e. g.* in Art. 297 theft is thus defined: if any one takes into his possession a moveable thing not belonging to him without the consent of the legal owner, yet without violence to any person, in order to appropriate it to himself illegally.¹ A difference is made in the punishment of theft with regard to the amount stolen (whether it be five or twenty-five florins), and only in certain aggravated cases, as housebreaking with arms, is the punish-

¹ We subjoin the exact expressions: "Wenn jemand eine fremde bewegliche Sache, ohne Einwilligung des Berechtigten, jedoch ohne Gewalt an einer Person, in seinen Besitz nimmt, um sich dieselbe rechtswidrig zuzueignen." As to the imperfections of the definitions of theft given in the French code and in the project prepared by Mr. Livingstone, see L. M. vol. 13, pp. 62—54. The definition in the code of Zurich is mentioned *post*, p. 125.—*Edit.*

ment applied without regard to the amount stolen, the punishment being from two to eight years' confinement. *Deceit* is explained in Art. 332, to be when any one, to the injury of the rights of another, knowingly gives out false things for true, or suppresses or keeps back actual facts, and thereby injures another or obtains an advantage for himself.

Legislation is also particularly active in Switzerland ; but it is easily seen that most of the projects and codes appearing there are imitations of such as have appeared in Germany, especially of those in Bavaria and Wirtemberg. A project of a criminal code has appeared in the canton of Lucerne ; another, and that a very remarkable one, in the Pays de Vaud, it being founded on publicity. Twelve judges (but not sworn) are to decide on the guilt of the parties after a public oral process, as in France, which is to take place in their presence ; and their decisions are to be given according to their internal conviction, without stating any reason. Two new projects of criminal codes appeared in 1835, one in the canton of Zurich, and the other for the city of Basle. The Zurich code is simple, consisting only of 272 articles. The punishment of death occurs very rarely in it, even high-treason being punished only with confinement of from sixteen years to the duration of life ; and robbery and arson (Arts. 203 and 228) in the highest degree, with imprisonment for life also. It is however added, that in very aggravated cases, the judges may award the punishment of death. It is also remarkable that this code is the first which (with the exception of France) has in modern times adopted the guillotine as the instrument of execution. Among the punishments affecting personal liberty, imprisonment in chains, imprisonment in a house of correction, and simple imprisonment are specified. Art. 38 contains the important clause, that convicts who have so conducted themselves in their places of punishment that the object of the law seems to be attained, are to be set at liberty ; if condemned for life, after the lapse of twenty years ; and if for a shorter time, after the expiration of two-thirds of their sentence.

A frequent punishment in the laws of Zurich is banishment from the canton, and even from Switzerland ; corporal punishment is excluded from them. By Art. 80, the judges are

empowered to reduce the punishment awarded by law in the following cases:—1st, if the culprit is below the age of nineteen; for such a culprit can never be condemned to death or imprisonment for life; criminals below sixteen can only be punished in an inferior degree: 2ndly, if a criminal acted in the highest state of intoxication, brought about without his fault.¹ Length of time since the commission of the crime forms no ground of mitigation. The definitions of individual crimes are simple and short, but mostly clear. Theft, for instance, is described in Art. 211 in the words used in the Württemberg code (*ante*, p. 123), with the omission of the words “without the consent of the rightful owner.”

The code of the city of Basle is likewise simple, consisting of no more than 170 articles; but the punishments are more severe than in that of Zurich. We still find in it branding, corporal punishment, and the pillory. Branding, however, according to Article 28, is not to be applied except in cases of relapse. All those condemned to work in chains are to be shut up at night in separate cells; a criminal below twenty years of age is to be condemned to twenty-four years’ labour in chains instead of death (Art. 3). Indeed the punishment of death is often threatened in this code; but in most cases the law adds, that when many mitigating circumstances appear, the judge may commute it for from twelve to twenty-four years’ labour in chains; as in Art. 43, in case of high treason; Art. 105, in case of infanticide; Art. 155, in the case of highest degree of robbery; Art. 165, in the several degrees of arson. The attempt at a crime (Art. 12), and the bare participation, “*theilnahme*,” (Art. 7) are punished with less rigour than completed crimes. The wording of the law is simple; definitions are avoided, but the kinds of crime are clearly indicated, with the punishments attached to each. Premeditated murder, if not fully accomplished, is punished with from twelve to twenty-four years’ labour in chains. Duelling, in case of one of the parties being killed, is punished with from three to twelve years’ labour in chains, and when there was an intent to kill, with from six to twenty years.

If we examine the principal objects of recent investigation,

¹ The original is “*Im höchsten Grade der unverschuldeten Trunkenheit.*”

and the latest theories prevailing in Germany with regard to criminal legislation, we arrive at the following results :—

1. The necessity of retaining the punishment of death is still acknowledged, there being as yet a want of means for inflicting a proportional punishment on great crimes, and because the state of the popular mind is still such, that without the punishment of death, it is to be apprehended that many crimes could not be checked, and because the people still demand the punishment of death for atrocious crimes ; nevertheless strenuous efforts are making to diminish the number of cases in which it is to be applied, it being chiefly limited to murder, treason of an aggravated kind, robbery and arson connected with the loss of life. The consequence of this is, that in Bavaria, Baden, and Wirtemberg, no more than two persons in a year are executed on the average ; and in Prussia from four to six at most.

2. The improvement of prisons is urgently demanded, nothing but the fear of the great expense preventing as yet the introduction of the penitentiary system. People are at least convinced that much is gained by isolating the convicts at least during the night. In Prussia, much has been done lately for the improvement of the houses of correction. At Butzow, in Mecklenburg, a new penitentiary is building. In particular, there are many societies in the different German states who make the fate of discharged convicts their care.

3. The abolition of corporal punishments is considered necessary, since it operates unequally, may prove injurious to health, and blunts the feeling of honour.

4. There is a general demand for the simplification of criminal codes ; they are not to be manuals containing principles which merely belong to science ; nor is it considered useful to attempt to render them perfect by the introduction of all possible cases, which, after all, is an impossibility, as there will constantly arise cases of which the legislature never thought. It is therefore considered more prudent to allow a greater range of discretion to the judge.

5. On the other hand, it is thought desirable that punishments should be clearly defined, so that every person may know what each law commands or forbids, and that the citizen may be secured against the caprices of the judge.

People therefore require a clear definition of what is to be a crime, especially as regards treason, since want of clearness as regards political crimes is extremely dangerous. The law, too, ought clearly to express what punishment is threatened, especially how far the judge may go in awarding it.

6. It is particularly wished that the judge should not be too much fettered by the letter of the law ; it is thought that he ought, on the contrary, to have a certain range within which he may inflict punishment according to the degree of guilt. It is even desired that the judge should be empowered, in case of many mitigating circumstances, to go below the minimum of punishment fixed by the law, as all cases cannot be foreseen, and the judge would be better able to consider the circumstances of any case than the prince who is to grant mercy.

The latest works on the criminal law are as follows :—
"Das Archive des Criminal-rechts," a quarterly publication, edited by the author of the present article, assisted by Professors Abegg of Breslau, Birnbaum of Utrecht, Heffter of Berlin, and Waechter of Leipzig. It is especially devoted to criminal law, giving every thing that is remarkable on the subject, with essays and criticisms of new codes. A good manual of criminal law has been published by Heffter of Halle, 1833. It is philosophically written, and contains good historical developements. Waechter's work, *"Abhandlungen aus dem Strafrechte,"* Leipzig, 1835, deserves commendation. The first volume contains a profound developement of the principles of carnal crimes, such as rape, seduction, adultery, and treats the subject more fully than any other work, both theoretically and practically. Abegg has published a work, *"Die verschiedenen Strafrecht's Theorien und ihr Verhältniss zu einander,"* Neufstadt, 1835. The author gives a very good account of the different theories in Germany. *"Systematisches Handbuch der gerichtlichen Psychologie,"* bey Friedreich, Leipzig, 1835, also deserves recommendation. Whatever can be interesting to the jurist in the department of Psychology,—for instance, the influence of drunkenness, of youth, of the different diseases of the mind,—are very completely collected and examined in this work.

The following works are on the punishment of death :¹ 1. "*Christenthum und Vernunft für die Abschaffung der Todesstrafe*," by Professor Groszman, (Berlin, 1835.) The author endeavours to show that the state has no right to inflict the punishment of death, which he considers Anti-Christian. 2. "*Ueber den gegenwärtigen Stand der Streitfrage ueber die Todesstrafen*," by Hepp, (Tübingen, 1835.) The author is of opinion that the punishment of death cannot yet be entirely dispensed with, in consequence of the want of a proper secondary punishment, but hopes that, through the progress of civilization, this object may be finally attained. A work on prisons has appeared under the title "*Anleitung zur Vollkommenen Besserung der Verbrechen in den Strafanstalten*," by Obemaier, Kaiserslautern, 1835. The author being himself director of the prison of that place, and speaking from experience, declares the present state of prisons to be bad ; and thinks that prisons should be built with a view to the improvement of convicts. He wishes each convict to be kept by himself, and is opposed to corporal punishment.

¹ This subject was fully discussed in the Law Mag. Vol. 11. p. 283. It is also treated by Mr. Livingstone, in his Introductory Report, with remarkable ability.

ART. VII.—CHANCERY REFORM—PROPOSED DIVISION OF THE CHANCELLORSHIP.

A Letter to the Right Hon. Viscount Melbourne, on the Present State of the Appellate Jurisdiction of the Court of Chancery and House of Lords. By the Right Hon. Sir Edward Sugden. London. 1835.

THIS pamphlet has brought matters to a crisis, so far as the recent mode of administering justice in the Court of Chancery is concerned, by proving incontestably that the measure of making the Master of the Rolls and the Vice-Chancellor Commissioners of the Great Seal, was one of the weakest, most inefficient and injudicious measures that a

weak, inefficient and injudicious ministry could have devised. We shall therefore merely sum up the evils which have resulted—which every one qualified to form an opinion saw and said from the first, must result—from it, and then proceed to the more permanently important question of the expediency of dividing the Chancellorship.

In the first place, the arrears in the Equity Courts have increased to such an extent that a cause set down for hearing immediately would probably not be heard for a year and a half from the period of setting down. It was not very long since that a Master of the Rolls refused to put off a case because there was no other business to be despatched; and Lord Brougham boasted of having placed himself in a nearly similar predicament with regard to the business peculiarly appertaining to him as Chancellor. How he brought about so desirable a consummation, is a question on which we may have a word or two to say; that he did arrive within a very short distance of it, is fact; and it might have been just as well to let the future generation of suitors benefit, whatever some of the past generation might have suffered, by his performances.

In the second place, what has been done has been badly done,—comparatively speaking, at any rate; and the decisions of the Commissioners have neither quite satisfied the parties, nor will be much respected as precedents. There has been too much hurry and flurry in all the Courts, appellate and original alike; much of the time that should have been devoted to the consideration of cases has been expended in hearing more cases than could be properly attended to; and with all possible respect for the learned Judges in question, it is impossible not to fancy that the peculiarity of their position may have lessened their average judicial effectiveness. This is so delicate a topic, that it seems best to suffer Sir Edward Sugden to speak upon it:—

“The present commission, your Lordship is aware, is constituted of the master of the rolls, the vice-chancellor, and a learned common law judge. Does this conjunction remove the objection? By no means; for as it was foreseen that if they sat in judgment upon their own decisions, they would hardly be prevailed upon to agree to a reversal, however necessary, an arrangement was made that

one of the equity judges should sit with the common law judge to review the decisions of the other equity judge. Now no plan could be more open to censure. It has a tendency to place the two equity judges in a continual conflict—to induce them to affirm each other's decisions, from the dread of having their own reversed, or to reverse, in order to place themselves on a level with the other branch of the court where reversals have already taken place. It is no answer to these objections, that nothing of this sort may have occurred; that the characters of the learned judges afforded a sure guarantee that it would not happen; that a judge would disregard his judicial duty who should so act. I am speaking of human nature, and no man ought, unnecessarily, to be placed in a situation in which a conflict may arise between his duty and his feelings. In another view, the appointment is still more objectionable; for a reversal by such a tribunal carries with it no higher authority than the original decision; each was pronounced by a judge of coequal jurisdiction daily and concurrently exercised. The decision on the appeal, therefore, instead of settling the point of law, merely raises a contention between the two judges, who may still, in their several jurisdictions, go on deciding according to their respective opinions, until a permanent and paramount judge of appeal settles the point. It really is establishing a perpetual see-saw between the two, instead of a controlling power over both. I have assumed that the two equity judges in reality decide the appeals from each other's decisions, because, although each has the assistance of the same able and enlightened judge, yet, as he has had no experience in equity, I suppose that he would in a great measure be guided by the equity judge with whom he sits.

“There happens to exist a difference of opinion between the two equity judges upon an important point of frequent occurrence; viz. whether a trust for the separate use of a married woman is valid beyond the particular marriage. This point came a second time before one of them in his own court since the commission issued, and he was asked from the bar to make a decree contrary to his own opinion, because, if he pronounced it according to his opinion, there would be an appeal upon which the other equity judge would sit, and he would reverse the decree! Now look for a moment at the situation in which the suitor might be placed. The master of the rolls decides against the validity of the trust: upon an appeal the vice chancellor, with the assistance of the third lord commissioner, reverses the decision. The vice-chancellor, in his own court, then decides the point in favour of the continuance of the trust; that decision is in its turn appealed from, and comes on before the

master of the rolls and the third lord commissioner; and the former judge adheres to his opinion, so that there can be no order made. This is not an improbable case, and it is not a satisfactory mode of settling the law of property."

Thirdly, the want of a responsible president of the appellate jurisdiction has been productive of manifold inconveniences in the House of Lords, where also a considerable arrear has been accumulating; and the advantages derivable from the presence of the most distinguished member of the legal profession in the cabinet have been lost.

Severely, however, as the measure has been felt, and long as its consequences must last, we regard them as trifling in comparison with that which the difficulty of procuring a Chancellor has forced upon the ministry. For, considering the known reluctance of Lord Grey's cabinet to the division of the Chancellorship when first advocated by Lord Brougham, it seems highly probable that no such expedient would have been resorted to, had not Lord Brougham, finding it impossible to bring over his former colleagues to his plan by argument, pursued the less difficult course of influencing their decision by his incapacity. They could not fill the office; they could not even provide for the temporary discharge of its duties; and therefore they resolved on abolishing it. The object of the following observations is to develop the real merits of this much-talked of, but little understood, question of division, which involves much more extended considerations than superficial observers may suppose.

The grand arguments in favour of the proposed change are: 1. The multiplicity of duties appertaining to the Chancellorship, which, it is contended, are too much for any individual to discharge. 2. That the political character of the office generally causes common lawyers, unacquainted with the peculiar practice of the Equity Courts, to be raised to the woolsack;¹

¹ "Sir Alexander Macdonald observed, that the chancellors in England were chosen from views much inferior to the office, being chosen from temporary political views. *Johnson*.—Why, Sir, in such a government as ours, no man is appointed to an office because he is the fittest for it; nor hardly in any other government, because there are so many connexions and dependencies to be studied. A despotic prince may choose a man to an office merely because he is the fittest for it: the King of Prussia may do it."—(*Boswell's Johnson*.) It is remarkable that the King of Prussia is the only potentate in Europe who does so at present.

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the House of Lords. Would such a man be qualified to decide appeals from the Vice-Chancellor, from the Master of the Rolls? He would hear, and he would listen ; he would discover a hole to pick here, a word to carp at there ; now a commentary to hazard : then a remark to risk ; but would he be competent to grapple with the difficulties of a complicated case? Would he have any confidence in himself? Certainly not; because he would well know that the profession had no confidence in him. Such a Lord Chancellor, he engaged to say, would confirm at least 19 out of 20 appeals. That which ought to be the last resort of suitors, the controller of judges, and the security of right,—the power of the appellate jurisdiction, would exist only in name."

After quoting the above extract (which describes Lord Brougham himself exactly), Sir Edward Sugden remarks:—

"To these powerful observations I may add, that if the political Lord Chancellor were placed at the head of the law, the arrangement would be a pure loss, for he would of course be changed with each successive administration—and changes appear likely to succeed each other with a rapidity which may shake our best institutions—and therefore we should not have what alone would render a great change desirable—an effective and permanent head of the law. The work might be well performed in the Courts below ; but who could answer for the decisions of the political chief, withdrawn altogether from the pursuit of the law, and the society of its fellows? It would not be safe to suppose that such a judge would generally abstain from reversing ; but, with his time principally devoted to politics, would he reverse in the right place? Whether he reversed or affirmed, the law would suffer great prejudice. No mere judge of appeal, not in the current of general business, would know the real state of the law ; he would read only with a view to the particular cases before him, and would soon be found to be incapable of establishing landmarks to guide the inferior jurisdictions."

The objection urged in the last sentence is the ordinary one urged against limiting the Chancellor to appellate business ; but those who urge it forget that a judge's legal education is completed before he is placed upon the bench.

As to the dependency of the character of a Court of Appeal on the character of the president—particularly when composed, like the House of Lords or the Privy Council, of

lay members—we may also refer to Sir Edward Sugden's authority :

“ There are few men of property upon whose most important interests Courts of Equity do not at some time adjudicate ; every man therefore looks with an anxious eye to the manner in which the judicial duties are provided for. The important duties assigned to a judge sitting in appeal, point to the necessity of appointing to the office not merely a competent person, but one in whom the bar has confidence ; for if the judge has not the confidence of the bar, he will not acquire that of the suitors. The law, as he propounds it, should be the rule for all. The great object of an appellate jurisdiction is at once to satisfy the justice of the individual case, and to keep the precedents uniform, and afford a standard for the inferior jurisdictions, and a sure guide for the practising lawyer. Whilst the law is unsteadily administered, no man at the bar cares to give a decided opinion, because he cannot depend upon the judge, and he justifies himself to the solicitors and the clients upon that ground. Every thing upon which any possible doubt can be raised is thus forced into Court, and the very means adopted to ensure safety in the particular case, increases the general mischief, until the law, instead of a blessing, becomes a curse to the people. To the first judge of appeal in this country is assigned the highest station, in order to give to his decisions all the weight which power and dignity can add to their intrinsic merits. It is the homage which the state pays to the law. Such a judge may properly take all the aid he can acquire upon particular cases, but the law will not be satisfactorily administered unless *his own opinion* be the most honoured, and that he act upon it so as to preserve one uniform rule. Fixation in matters of law, above all things, tends to prevent litigation, and to make a people contented.”

Until within a recent period, the Judicial Committee of the Privy Council afforded an ample illustration of the inconveniences resulting from the want of a responsible chief. Though there was no marked deficiency of judicial strength, the mode of discharging the business continued unsatisfactory, because no one felt bound to give a constant and undivided attention to it. The interest taken by one of our most accomplished judges (Baron Parke) in the proceedings of this tribunal, has latterly added much to its effectiveness ; but this is an unbought sacrifice of time and talent on which the public are clearly not entitled to calculate for a continuance.

Sir Edward Sugden, therefore, with reason protests against extending the jurisdiction of this Court:

“ No court of appeal will act to the satisfaction of reasonable men, unless it is composed, as long as circumstances will permit, of the same persons, whose express duty it is to hear the appeals, and who are responsible for the decisions, nor unless they are presided over by an accomplished lawyer, to whom the profession and the suitors may look up with confidence. I trust that the House of Lords will not part with their jurisdiction in the appeals. *Strip that House of the Heads of the church and the law, and it may fall an easier prey to its enemies.*”

In another place he says:

“ The composition of the Judicial Committee may not be considered such as would be proper for the final hearing of the great real property and equity causes of the empire. It would not be proper that some of such cases should be heard under the direction proposed to be provided; and throughout the proposed measure, the constitutional objection to the investing of the Privy Council with judicial power is altogether lost sight of, as well as the leading principle which ought to govern the constitution of a final court of appeal, viz. unity of opinion, for which purpose the same person should preside as long as circumstances will permit. He ought to have the ablest assistance with which the judicial bench can furnish him; *but still the one mind should mould and apply the principles*, so as to afford a uniform rule of property, which is one of the greatest blessings any administration—Whig or Conservative—can confer upon the people at large.”

It is obviously immaterial to the present argument, whether the supreme appellate jurisdiction be vested in the House of Lords, or in the Privy Council, or in any other high tribunal that may be formed, except that it would be extremely dangerous for the House of Lords to part with it. It is enough for us to show that the supreme appellate jurisdiction will be seriously impaired by any measure tending to lower the legal character of the Chancellor, who, under any circumstances, may be expected to be its chief.

But not only do we lose the first lawyer in the kingdom as a judge; we lose him also as a member of the cabinet, where his services are imperatively required.

“ Every one (said Lord Brougham, in 1828,¹) must at once

¹ Speech on the Reform of the Law.

admit, that if we view the whole establishments of the country—the government by the king, and the other estates of the realm,—the entire system of administration, whether civil or military,—the vast establishments of land and of naval force by which the State is defended,—our foreign negotiations, intended to preserve peace with the world,—our domestic arrangements, necessary to make the government respected by the people,—or our fiscal regulations, by which the expense of the whole is to be supported,—all shrink into nothing, when compared with the pure, and prompt, and cheap administration of justice throughout the community. I will, indeed, make no such comparison; I will not put in contrast things so inseparably connected; for all the establishments formed by our ancestors, and supported by their descendants, were invented and are chiefly maintained, in order that justice may be duly administered between man and man. And, in my mind, he was guilty of no error,—he was chargeable with no exaggeration,—he was betrayed by his fancy into no metaphor, who once said, that all we see about us, King, Lords, and Commons, the whole machinery of the State, all the apparatus of the system, and its varied workings, end in simply bringing twelve good men into a box. Such—the administration of justice—is the cause of the establishment of government—such is the use of government: it is this purpose which can alone justify restraints on natural liberty—it is this only which can excuse constant interference with the rights and the property of men.”

Is it not right and proper, then, that this all-pervading principle should be represented in the cabinet? Is it not demonstrably advisable that there should be always some one present at the deliberations of the government practically acquainted with the administration of justice, thoroughly versed in all the ramifications of the system, familiar with all its modes of operating, and capable of pointing out immediately where proposed measures would clash with it, or in what manner they had best be moulded into harmony with its principles. But it is not merely the indirect influence of this species of knowledge at a council-table, that renders the presence of a great law dignitary like the Chancellor desirable. Many of the most important measures that may be expected to be brought

forward in the course of the next three years, are measures directly affecting the administration of justice. A new criminal code is in preparation; the demand for local courts will be renewed; the expediency of an unpaid magistracy will be brought into question; the state of law in the colonies is a subject of very general and just complaint; and the defects of the supreme appellate jurisdiction must clearly be remedied without delay. There is also a vast amount of legal patronage, (judgeships, commissionerships, &c.,) for the distribution of which some competent adviser should be responsible, and the revisal of the Recorder's report, with the approval of treaties &c., have always devolved upon the Chancellor. No mere minister of justice could perform a tithe of these duties, unless he had lived all his life amongst lawyers, and enjoyed a considerable practice at the bar; and to suppose that the attorney-general or the solicitor-general could supply the deficiency, is ridiculous. They could only give opinions on cases formally submitted to them; and to be able to state a case presupposes a knowledge of the difficulty, which is the very thing that will be constantly overlooked. Besides, it is not mere points of law, but questions of policy involving legal relations, to which we more particularly refer. If, too, the place of one member of the cabinet representing an important branch of the public service, may be supplied by the occasional assistance of a subordinate, what is to prevent us from extending the principle till we have reduced the cabinet to unity? Nay, a king, like Louis Philippe, might say with Regan, "What need one?" A member of the cabinet of the legal profession is also necessary to expound and justify the legal operation of cabinet measures in Parliament.

We now come to the effect the change would operate on the peerage and the bar. We shall introduce this branch of the subject by a quotation from one of the most profound political writers of the age:¹

"The lawyers have been mixed up with all the movements of political society in Europe for the last five hundred years. One while they have served as instruments to political powers; one while they have used political powers as instruments. In the middle

¹ *De la Democratie en Amerique*, by M. de Tocqueville, vol. ii. ch. 8. This work has been translated by Mr. Henry Reeve, under the author's inspection; but the above version is our own.

age, the lawyers have wonderfully co-operated to extend the dominion of kings ; since that time, they have laboured effectively to restrain this same dominion. In England, they have been seen to enter into intimate union with the aristocracy ; in France, they have shown themselves its most dangerous enemies. Do, then, the lawyers yield to sudden and passing impulses, or do they obey more or less, according to circumstances, instincts which are natural to them, and which are constantly reproduced ? I should wish to clear up this point ; for perhaps the lawyers are called to play the first part in the political society which is struggling into life."

After explaining the manner in which legal studies necessarily inspire a love of order and an attachment to forms, and thus place those who follow them in opposition to the objects and habits of democracy, he continues—

"In all free governments, whatever their form, lawyers will be found in the first ranks of all the parties. The same remark is applicable to the aristocracy. Almost all the democratic movements which have agitated the world have been directed by nobles. A select body can never satisfy all the ambitions it includes ; there are commonly found in it more talents and passions than employments ; and we do not fail to discover in it a great number of men who, not being able to grow great rapidly enough by means of the privileges of their body, seek to grow great by attacking those privileges. I do not assert, then, that there ever will arrive an epoch, when *all* lawyers—nor that the greater number of them in all times¹—will show themselves friends of order and enemies of change. I say that in a society where lawyers occupy, without dispute, the elevated position naturally belonging to them, their spirit will be eminently conservative, and will show itself anti-democratic.

"When the aristocracy closes its ranks to the lawyers, it finds in them enemies by so much the more dangerous, that, though beneath it in riches and power, they are independent of it by their labours, and feel themselves on a level with it by their intelligence."

"But on every occasion when the nobles have been willing to share some of their privileges with the lawyers, these two classes have experienced great facilities in uniting, and have found themselves, so to speak, of the same family.

¹ This passage is mistaken by Mr. Reeve, who, in the first of the above paragraphs, also, translates "*des instincts qui leur soient naturel, et qui se reproduisent toujours*"—"principles which are inherent in their pursuits, and which will always recur in history." The language of so accurate a writer as M. de Tocqueville should not be trifled with in this manner.

* * * * *

"The government of the democracy is favourable to the political power of lawyers ; where, (as in America,) the rich, the noble, and the prince are excluded from the government, the lawyers arrive at it of full right as it were ; for, in that case, they are the only enlightened and able men that the people can choose out of their own body.

"If the lawyers are naturally inclined towards the aristocracy and the prince by their tastes, they are thus naturally inclined towards the people by their interest. Thus lawyers like the government of the democracy without participating in its tendencies, and without imitating its weaknesses—a double cause for being powerful by it and over it.

"The people, in a democracy, do not distrust the lawyers, knowing that it is their interest to serve the people ; they are listened to without anger because they are not suspected of *arrière-pensées*. In fact, the lawyers have no wish to overturn the government of the democracy, but they strive unceasingly to direct it according to a tendency not its own, and by means which are foreign to it. *The lawyer belongs to the people by his interest and his birth ; to the aristocracy, by his habits and his tastes. He is as the natural tie between these two things, as the ring that unites them.*"

The direct inference deducible from these passages undoubtedly is, that the lawyers and the aristocracy of England should combine for mutual support ; but it would be a gross error to suppose that the well-being of either is adverse to the well-being of the community.

Even as things stand at present, the House of Lords constitutes the sole deliberative assembly we possess, and should the practice of exacting pledges, dictating instructions, and bullying members at public meetings, grow into general adoption, it will soon be the sole assembly where any thing like an adequate representation of the talent, property, independent character, high principle and real enlightenment of the country will be found. "When (says M. de Tocqueville) you enter the Chamber of Representatives at Washington, you feel struck by the vulgar aspect of this great assembly. The eye often looks round in vain for a man of celebrity within its bosom. Almost all the members are obscure personages, whose names present no image to the thought. They are for the most part village lawyers, traders, or even men be-

longing to the lowest classes. In a country where education is almost universally diffused, it is said that the representatives of the people do not always know how to read and write.

"Two paces off is the entrance of the Senate, whose narrow precincts contain a large proportion of the celebrities of America. Hardly a man is to be seen in it who does not recal the idea of a recent illustration. These are eloquent advocates, distinguished generals, able magistrates, or tried statesmen. Every word that escapes from this assembly would do honour to the greatest parliamentary debates of Europe."¹

The cause of the difference, as he explains it, is, that the chamber of representatives emanates directly from the people, and the senate does not. Is it irrational to fancy that the same causes may produce similar effects in this country, when (if ever) the counteracting influences shall be removed?

The public are equally interested in sustaining the elevated position of the bar.² It is not simply the check they form upon the bench in arbitrary times, but the check they form upon litigiousness and pettifogging in all times, to which we are now alluding. When the barrister is the medium through which alone the judge can be approached, and it has grown into a custom to take no important step in a law-suit without a barrister's opinion, it is obvious that the frequency and character of legal proceedings will very greatly depend on his being superior to sinister motives and duly qualified to advise his clients properly. Accordingly, in all countries where a harassing spirit of litigation is widely diffused, it will be found that the evil arises principally from the want of respectability in the practitioners. Nor do the consequences stop here; for ignorant and dishonest lawyers make laws uncertain and oppressive, not only by their own immediate perversion and chicanery, but by affording no adequate materials

¹ Vol. ii. ch. 5.

² The Times, in announcing the recent elevations to the peerage, endeavours to excite a prejudice against lawyers by speaking of them as a class that live by the dissensions of mankind. Just so it may be said that medical men live by our diseases, and the clergy by our sins. There is a story in the new *Joe Miller*, in which this sort of objection is much more pointedly put than by the Times. The chaplain at a mess-dinner gave "*Buonaparte!*" as a toast, and on being called to account by the officers, retorted "that they and their cloth lived by him." "Well, then"—said the colonel—"here's the Devil, for you and your cloth live by him."

for the bench, since it is impossible to get learned and upright judges from an ignorant and pettifogging bar. We say thus much to neutralize the effect of certain petty, jealous, carping insinuations which it is the fashion to scatter against the bar, being well aware that the profession is in no very great immediate danger, though at the same time it is impossible to say where a principle of deterioration, once set in motion, may stop. As to the threatened innovation, its probable mode of working may be illustrated by an argument used in favour of Catholic Emancipation. What interest (it was asked) has the Irish peasant in having a road to dignity laid open to him, which he can never hope to tread, except by a degree of good fortune little short of miraculous? The interest (it was answered) which every man possesses in the elevation of his class, in the acquirement of a new element of self-esteem, in the additional incitement held out to the exertion of his talents and industry. Something of the same sort may be replied to those who urge the insufficiency of one grand prize, like the Chancellorship, to sustain the position of the bar. Slight and subtle as the train of associations may be thought, it is still clear to us that the possibility of attaining to this rank forms a grand attraction to most of our young recruits of promise, and that the knowledge that they may attain to it acquires them no trifling portion of their consideration with the world. It is from the apex of the pyramid that men calculate its height; and lustre may be reflected over a whole profession from the coronet which sparkles at its top.

A well-known incident in the life of Thurlow will help to show the prevalence of this feeling in the community.

In the course of the inquiry into Lord Sandwich's administration of Greenwich Hospital, the Duke of Grafton thought proper to taunt Lord Thurlow with his humble birth and his recent creation as a peer. Thurlow rose from the woosack and advanced slowly to the place from whence the Chancellor addresses the House. " ' I am amazed,' he said, in a level tone of voice, ' at the attack the noble duke has made on me. Yes, my lords,' raising his voice, ' I am amazed at his grace's speech. The noble duke cannot look before him, behind him, or on either side of him, without seeing some noble peer who owes his seat in this House to his successful exertions

in the profession to which I belong. Does he not feel that it is as honourable to owe it to these, as to being the accident of an accident? To all these noble lords the language of the noble duke is as applicable and as insulting as it is to myself. But I don't fear to meet it single and alone. No one venerates the peerage more than I do; but, my lords, I must say, that the peerage solicited me, not I the peerage. Nay more, I can say, and will say, that as a peer of parliament, as speaker of this right honourable house, as keeper of the great seal, as guardian of his majesty's conscience, as lord high chancellor of England, nay, even in that character alone in which the noble duke would think it an affront to be considered,—as a man, I am at this moment as respectable,—I beg leave to add, I am at this moment as much respected, as the proudest peer I now look down upon.' 'The effect of this speech,' (adds Mr. Butler, from whom we quote,) 'both within the walls of parliament and out of them, was prodigious. It gave Lord Thurlow an ascendancy in the house which no chancellor had ever possessed: it invested him, in public opinion, with a character of independence and honour; and this, though he was ever on the unpopular side in politics, made him always popular with the people.'

Why did this speech make him always popular with the people? Because it embodied the true principle of equality, because it struck home to the sympathies of the mass, because it put him forward as the champion of the peoples' rights, and because the meanest amongst the people could feel, that the privilege of rising by honourable exertion to the first rank amongst the hereditary peerage of the land, was one in which they, and their children, and their children's children, were interested—the best preservative against the exclusive spirit of an aristocracy, the surest proof of the popular character of the constitution. Yet it is a popular ministry that now proposes to close up perhaps the only remaining avenue through which unaided talent can work its way to nobility.

We cannot refuse ourselves the gratification of here appealing to the authority of Mr. Canning, though Sir Edward Sugden has already called attention to the speech:

"For his own part, he could not see any objection to the union of the two characters in the same individual; especially as they

were far, very far from being inconsistent with each other. When the advocates for their separation told him that they saw a great objection to the making a political character a Judge, he was inclined to ask them what the situation of the country would be, supposing that there were placed at the head of the hereditary magistracy of the land an individual unacquainted with its laws and institutions? Would not such an occurrence lower the respect in which they were now universally held throughout the country? and if it did lower the standard of the magistracy and the dignity of the Peerage, would it not be inflicting a severe and permanent injury on the Constitution, instead of correcting one that was comparatively trivial and temporary? It had not occurred twice in the history of our country, that the cold impartiality of the Judge had given way to the warmth of his political passions; and if, in the long night of ignorance in which so much of our annals were involved, not more than two instances of this judicial profligacy could be discovered, he thought that he was not too bold in saying that at an æra so intelligent as the present, such instances were not likely to occur again. To avoid, however, a contingency which he contended was remote and improbable, it was now proposed to convert the Lord Chancellor into a mere lawyer; to destroy all the ancient grandeur and dignity of his office; and to degrade, as much as possible, the race of men from which it had hitherto been usual to select that ancient and distinguished officer.¹ To such proposition he had formerly felt, and he still continued to feel, the strongest aversion.' "

The question therefore stands thus. The separation may be fairly expected to cure some of the inconveniences resulting from the political character of the appointment, but, on the other hand, it will render the supreme appellate jurisdiction ineffective, weaken the cabinet, lower the whole profession of the law, and ultimately endanger the very existence of the peerage by giving it a new character of exclusiveness.

H.

¹ This topic was also remarkably well put by Mr. Horace Twiss.—See Hansard, New Series, vol. xix. p. 76—78.

ART. VIII.—THE BROUGHAM AND COOPER REPORTS.

Select Cases decided by Lord Brougham in the Court of Chancery, in the years 1833 and 1834, edited from his Lordship's original Manuscripts. By CHARLES PURTON COOPER, Esq. Barrister at Law. Vol. I. pp. 521, Roy. 8vo. London, 1835.

WE have already passed on Lord Brougham's judgments a sentence¹ we see no occasion to recall, and it is not our immediate intention to subject the *Select Cases* now before us to criticism. But we think it right to notify the existence of the book to the profession, since it is to be apprehended that its existence will only become known to them through this sort of notification or by the advertisements. Moreover, the circumstances attending its appearance are, we undertake to say, altogether anomalous. The first paragraph of the Preface runs thus :—

“ La plupart aussi de ces *reports* sont composés de décisions qui ne diffèrent en rien de celles qui sont déjà imprimées.” No volumes can be more liable than the present to this objection brought in my *Lettres sur la Cour de Chancellerie* against the modern Reports. The greatest part of the cases comprised in them have already been edited with great accuracy and ability by Mr. Mylne and Mr. Benjamin Keen, and in a form which, as it admits a fuller statement of facts, must always be deemed more satisfactory to the profession than that in which they now appear.”

This candid avowal so completely demolishes all prospect of circulation in the profession, that we wonder even the pleasure of quoting from himself should have induced Mr. Cooper to hazard it. But it is unnecessary to state the unavoidable conclusion, for he anticipates it :—

“ What, then, it will be asked, is the motive for this new publication? And I must frankly own my inability to make any reply to the question, except that this publication originates in a promise to a distinguished Jurist and Statesman of another country, who was desirous of possessing, in a separate work, authentic copies of all such Judgments of Lord Brougham, whilst presiding in the Court of Chancery, as had previous to the delivery been put into writing—a promise, hastily, and looking at my other occupations, impru-

¹ Law. Mag. vol. vii. 348.

dently given, but from the performance of which, for reasons that it is not necessary here to mention, I have not thought myself at liberty to withdraw."

It has been stated in a morning paper with which Mr. Cooper is understood to be in frequent communication, that the distinguished jurist and statesman of another country is M. Dupin, with whose name Lord Brougham has constantly shown an excessive anxiety to associate his own; and we are expected to believe that M. Dupin is so extremely anxious to possess, in a separate work, copies of judgments which are to be found consecutively and more accurately given in Messrs. Mylne and Keen's excellent Reports, that (Shylock-like) he holds Mr. Cooper to the very letter of his bond;—though the promise was most probably given under the belief that no one else would turn reporter to Lord Brougham, though it was "hastily, and looking at Mr. Cooper's other occupations, imprudently given;" and though the performance of it must unavoidably entail an expense of two or three hundred pounds on *somebody*.

As the Preface proceeds, however, we find Mr. Cooper has not done justice to his collection, which has actually one feature of novelty:—

"It will be seen that the Cases now published are entitled 'Select,' a term which, without explanation, is calculated to mislead. The utility of a judgment, as a judicial precedent, is by no means the criterion by which I have been guided in my choice. It was the wish of the eminent individual, to whom I have above alluded, that all judgments should be inserted, which, from the recital of circumstances contained in them, or from the short abstract prepared from the papers in my possession, would be intelligible to the reader, although affording nothing more than specimens, either of Lord Brougham's mode of sifting and combining facts, and reasoning upon them, or of his juridical style. Hence some few Judgments will be found in these volumes which Mr. Mylne and Mr. Keen have *very properly* rejected, as being altogether foreign to the legitimate object of Equity Reports."

It is Mr. Moore, we believe, who justifies the preservation of some of Sheridan's loose memoranda by comparing them to chippings in the workshop of Phidias. This was unjust as regards Sheridan, for Phidias' chippings must have been

exactly like any other man's chippings: but for that very reason the comparison would have fitted these specimens of Lord Brougham's style of sifting facts to a hair. His mode of reasoning, however, was certainly original as applied from the Bench; for his ordinary mode was precisely that which he had found so effective in debate. He commonly dashed at some weak point in the argument for the side to which his own crude impression was opposed, and then rested the whole case upon that point to the entire neglect of the principle.

Hitherto Mr. Cooper's Preface shows the most exemplary spirit of self-sacrifice, and the most entire devotion to the cause. But before he wrote the concluding paragraph, it would seem that a wet blanket had been thrown upon his zeal.

"The tediousness of correcting the press of this first volume I have found means to diversify, *by following to their sources in the Civil and Feudal Laws* the doctrines involved in some of the most important decisions; and it was my intention to prefix the notes made by me on these heads by way of introduction; but they were unfinished at the end of the period which I had set apart for the fulfilment of my editorial task, and I have not since had a single opportunity of touching them. The notes in question, therefore, should they ever be put forth, must be reserved for the second volume, the whole of which is in type, although there is no prospect of my being able to revise it for some months to come."

Writing notes on civil and feudal law is a strange mode of diversifying the mechanical labour of correcting the press, and (we mean no disrespect by the allusion) the image here presented of Mr. Cooper following Lord Brougham's doctrines to their sources, involuntarily reminded us of Dr. Dousterswivel following hidden springs to their sources with his divining rod.

To the best of our information the only instance in which these Reports have been recognized from the bench was by Lord Brougham himself some time prior to their appearance. In the course of an argument in the House of Lords (in Lord Durham's case, we believe, being an appeal from Lord Brougham's decision as chancellor) a dictum of Lord Brougham was

quoted from Mylne and Keen, somewhat at variance with an opinion he was maintaining at the time, and he then astounded the bar by referring, in explanation, to "Cooper's Reports," which no one had ever heard of until then. This trifling incident, though perhaps not sufficient to establish their authority, affords a better key than the whole of Mr. Cooper's Preface to the motives of the publication.

Lord Brougham had enunciated sundry propositions, which he was anxious to correct.¹ He had also no objection to go down to posterity with two bound volumes of his own decisions in his hand, since there appeared little prospect of going down like Napoleon with a code; and he thought perhaps that a well-timed publication of the sort might promote his designs upon the chancellorship. Mr. Cooper, on his side, had no objection to the notoriety of this species of connection with Lord Brougham. This is the simple truth, and the preface is from beginning to end a palpable and extremely clumsy mystification.

H.

¹ The celebrated proposition, that persons respectively related in the same degree to a third person are necessarily related in the same degree to each other, is retained, probably from its catching resemblance to a well-known axiom in Euclid, and therefore indicating a taste for mathematical pursuits. In a few instances, where the law as originally pronounced did not correspond with the facts, the facts have obviously been altered to correspond with the law.

DIGEST OF CASES.

COMMON LAW.

[Comprising 2 Adolphus & Ellis, Part 2; 4 Nevile & Manning, Part 4; 5 Nev. & Man. Part 1; 2 Bingham's New Cases, Part 2; 1 Scott, Part 4; 2 Crompton & Meeson, Part 4; 2 Crompton, Meeson & Roscoe, Part 2; 4 Dowling's Practice Cases, Parts 1 and 2:—all Cases included in former Digests being omitted.]

ACCORD AND SATISFACTION. See PLEADING, 7.

ACTION ON THE CASE.

(*Nuisance—Limitation of action.*) The plaintiff, a bookseller, having a shop by the side of a public thoroughfare, suffered loss in his business in consequence of passengers having been diverted from the thoroughfare by the defendants' continuing an authorised obstruction across it for an unreasonable time: Held, that this was a damage sufficiently of a private nature to form the subject of an action. (M. 27 H. 8, fol. 27; Co. Litt. 56 a.; Cro. Eliz. 664; 1 Keb. 847; Carth. 156; Ld. Raym. 486; 4 M. & Sel. 101; 2 Bing. 263; 1 Esp. 148.)

A statute, under which the defendants had caused the obstruction, enacted that all actions against them should be commenced within six months after the *cause of action* arose. The grievance in question continued from April 2d to July 2d; the action was commenced December 30th: Held, that the plaintiff could recover only for the damage accruing on the 1st and 2d July.—*Wilkes v. Hungerford Market Company*, 2 Bing. N. S. 281.

ADVERSE POSSESSION. See EJECTMENT, 1.

AFFIDAVIT.

1. If an application, made at chambers, be referred to the Court, an affidavit sworn in answer to the application at chambers may be used on shewing cause before the Court. (1 Scott, 283.)—*Worthington v. ———*, 2 C., M. & R. 315.
2. (*Filing.*) Affidavits in answer to a rule enlarged from one term to

another, and which requires the affidavits to be filed a certain time before the term, must in all cases, (although a contrary practice has prevailed,) be filed within the time prescribed, unless the party is prevented from filing them by inevitable accident.—*Turner v. Unwin*, 4 D. P. C. 16.

3. (*Description of deponent.*) Where an attorney and his clerk make a joint affidavit, the residence of the latter need not be stated, if that of the former is.—*Bottomley v. Belchamber*, 4 D. P. C. 26.
4. (*Intitling.*) In intitling an affidavit, the parties should be described as "plaintiff" and "defendant".—*Harris v. Griffith*, 4 D. P. C. 289.
5. (*Made by prisoner, description of residence in—Commissioner for taking affidavits, proof of authority of.*) A prisoner defendant need not comply with the rule of Hil. Term, 2 Wm. 4, s. 5, by stating his residence in an affidavit.

The chief justice's clerk's list of commissioners is conclusive evidence as to whether a particular person is or is not a commissioner of the English Court of C. P. for taking affidavits, pursuant to the 3 & 4 Wm. 4, c. 42, s. 42. And two months' delay in taking the objection that the affidavit of debt was not sworn before such a commissioner, was held not to be a waiver of it.—*Sharpe v. Johnstone*, 2 Bing. N. S. 246; 4 D. P. C. 324.

AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit of debt claiming interest must shew that it accrued pursuant to agreement.

An affidavit of debt bad as to part is insufficient. (2 D. P. C. 381; 3 D. P. C. 584.)—*Drake v. Harding*, 4 D. P. C. 34.

2. But an affidavit of debt made by assignees of a bankrupt, claiming a certain sum for money lent, paid, &c. by the bankrupt, to and for the use and at the request of the defendant, "and for interest thereon agreed to be paid" by the defendant, was held sufficient.—*Harrison v. Turner*, 4 D. P. C. 72.

AGREEMENT. See PROMISSORY NOTE, 2.

AMENDMENT.

In an action on the case against the defendants as *carriers*, for negligence, it appeared from the evidence that the defendants, if liable at all, were liable as *wharfingers*, on a contract to *forward*. Just before the plaintiff's counsel commenced his reply, he applied to the judge to amend the declaration, which however the judge refused to do, but left it to the jury to say whether there was a contract to forward or to carry; and they found there was a contract to forward. He then directed the verdict to be entered for the defendants, but the special finding to be indorsed on the postea, that the Court might proceed therein according to the 3 & 4 W. 4, c. 42, s. 24. The Court allowed the amendment on payment of costs, observing that the learned judge might have allowed the amendment, and postponed the trial to a future day, pursuant to sect. 23 of that statute.—*Parry v. Fairhurst*, 2 C., M. & R. 190.

ANCIENT LIGHTS.

A party may so alter the mode of enjoyment of ancient lights as to lose the right to them altogether.—*Gurritt v. Sharpe*, 4 Nev. & Man. 834.

APOTHECARY.

(*Action by—Pleading.*) In an action for an apothecary's bill, the objection that the plaintiff was not in practice as an apothecary prior to or on the 5th August 1815, and had not obtained a certificate from the Apothecaries' Society, need not be pleaded, but may be taken on *non-assumpsit*.—*Morgan v. Ruddock*, 4 D. P. C. 313.

APPEAL. See JUSTICES, 1, 2.

ARBITRATION.

1. A clause in a submission-deed, "that no action or suit shall be commenced against the arbitrators concerning their award, when made, or to impeach the said award, unless some collusion or fraud be discovered or appear therein," does not preclude a party to the submission from moving to set aside the award for illegality on the face of it, though no collusion or fraud appear.

On a reference of partnership disputes, a direction in the award that some of the parties should pay a sum of money, (which was one of the matters included in the reference,) *to the arbitrator*, and that he should apply the same to the payment of certain specified demands which were referred, was held bad, so as to vitiate the award; although in the tenor of it the payments appeared to be for the benefit of the parties to the submission, and not of the arbitrator.—*In the matter of Mackay*, 2 Ad. & E. 356.

2. (*Effect of award of general releases.*) Where all matters in difference are referred, an award directing the execution of general releases, closes all accounts between the parties up to the time of the submission. (1 Saund. 28, c.; 1 Moo. & Rob. 96.)—*Trimmingham v. Trimmingham*, 4 N. & M. 786.

3. (*Setting aside award—Arbitrator's authority—Costs.*) A rule *nisi* to set aside an award must state specifically the particular grounds of objection, and it is not sufficient to state that the arbitrator has exceeded his authority, or that the award is uncertain, and not final.

By agreement of reference between A. and B., stating that A. claimed a yard and pump therein as his exclusive property, but that B. had, after notice to the contrary, entered the yard and taken water from the pump, and that there was a hedge and ditch dividing the lands of A. and B., which A. alleged that B. had removed into his (A.'s) land; all matters in difference were referred to C., who was also empowered to direct how, and by whom, and in what manner, the yard and pump, and hedge and ditch, should thereafter be occupied and enjoyed, and who should have the *care and management* thereof. C. awarded that the *yard and pump* were the exclusive property of A., except that B. had a right to take water from the pump, and to have ingress and egress to and from the yard for that purpose; and further, that the pump should thereafter be considered

as belonging to A. and B. jointly, and to be repaired at their joint expense; and that B. had not removed the hedge and ditch into A.'s land, but that thereafter the hedge should be kept in repair by B., who for that purpose should be at liberty to take mud from the ditch; but that, subject to such privilege, the ditch should thereafter be considered as the exclusive property of A.: Held, that the direction as to the future enjoyment, &c. was not inconsistent with the other part of the award; and that the arbitrator had not exceeded his authority by such direction.

The submission also recited that an action of trespass had been commenced by A. against B., and it was agreed that all the costs should abide the event of the award: Held, that C. could not make any order as to costs; and that, not having decided all the matters referred to him in favour of either party, each must pay his own costs.—*Boodle v. Davies*, 4 N. & M. 788.

4. (*What is sufficient award on party to pay money.*) After declaration, and before plea, a cause and all matters in difference were referred, by a judge's order, to arbitration, costs to abide the event of the suit. The arbitrator awarded that a verdict should be entered for the plaintiff, with 55*l.* damages, and that in all the matters in difference between the parties there was not any sum of money due to either of them: Held, that there was no sufficient direction that the defendant should pay the plaintiff the 55*l.*; and the Court refused an attachment to enforce payment either of that sum or of the costs. (3 Bing. 331, 634; M'Cl. & Y. 200. Overruling *Cartwright v. Blackwell*, 1 D. P. C. 489.)—*Donlan v. Brett*, 2 Ad. & E. ; 4 N. & M. 854.
5. (*Award, when final or certain.*) An award recited, that by a written agreement between the plaintiff and defendant, reciting, that they had for some years carried on business in copartnership as builders and excavators, and had become possessed of certain messuages, buildings, and premises, sums of money, and other effects, and that disputes had arisen between them touching their accounts and dealings, and as to a division of the said partnership effects, and that they had agreed to refer such disputes to the decision of A. and B., who should have power to direct a division of the partnership effects between them, each party thereby agreed to abide by the award of A. and B., and to execute to the other a conveyance of the messuages, &c., according to such division between them as the arbitrators should award: the partnership having been dissolved by mutual consent. The arbitrators then awarded that the defendant should pay to the plaintiff 223*l.* in full of all demands, in respect of his moiety of the partnership estate and effects, and that on payment thereof, and upon having such conveyances as were thereafter mentioned tendered to him for execution, the plaintiff should execute a proper conveyance to the use of the defendant of certain messuages, &c. therein mentioned, subject to certain mortgage debts charged thereon. They also awarded that all the debts then due and owing to and from the partnership should be received and paid by the plaintiff and defendant in equal proportions; and that if either party should advance or pay any sum or sums of money over and

above his half share or proportion of the partnership debts, the amount so overpaid should be made good on demand. To an action on this award to recover the sum of 223*l.* from the defendant, he pleaded (after setting out the award as above) that the several messuages, &c. in the award mentioned, and directed to be conveyed to the defendant, were the whole of the said copartnership messuages, &c., and that there was not in the award any other provisions than those before specified concerning the said copartnership estate and effects, or the division thereof, or any part thereof: Held, on demurrer to this plea, that the award was final; that it was sufficiently certain, and that it was not inconsistent.—*Wood v. Wilson*, 2 C., M. & R. 241.

6. (*Award, when final.*) Where, upon a reference of a cause to arbitration, the costs of the suit and of the reference and award were to abide the event of the award, and the arbitrator directed that the defendant should deliver certain goods to the plaintiff, and the plaintiff should pay a certain sum to the defendant, on which payment all proceedings in the cause should cease, and each should give the other a general release: Held, that the award was sufficiently final, and that the event was, that each party should pay his own costs. (5 B. & Ad. 403; 4 N. & M. 788.)—*Yates v. Knight*, 2 Bing. N. S. 279.
7. (*Award, when final.*) A cause and all matters in difference were referred, costs to abide the event of the award. The defendant had a cross demand for a larger amount than the plaintiff claimed in the action. The arbitrators awarded that the action should cease and be no further prosecuted; that on the balance of accounts 661*l.* was due from the plaintiff to the defendant, and that the plaintiff should pay that sum to the defendant. The Court refused to set aside the award on the ground that it did not sufficiently determine the action. (5 B. & Ad. 403; 8 Bing. 13; 10 Bing. 507.)—*Eardley v. Steer*, 2 C., M. & R. 327.
8. (*Setting aside award—Costs.*) The costs of showing cause against a rule for setting aside an award, are costs in the cause; and the plaintiff was allowed them, though his damages were reduced from 171*l.* to 22*l.*—*Goodall v. Ray*, 4 D. P. C. 1.
9. (*Enlargement of time.*) Where, in an action of trespass, the time for making an award, pursuant to an order of *nisi prius*, expired before the award was made, and the arbitrator had not enlarged the time as empowered by the order, and the defendant refused to consent to an enlargement, without assigning any reason for his refusal, the Court ordered judgment to be signed, and execution to issue for the amount found by the jury subject to the reference, unless the defendant consented to the enlargement.—*Wilkinson v. Time*, 4 D. P. C. 37.
10. (*Setting aside award.*) An award made in pursuance of an order of *nisi prius*, referring a cause and other matters in difference, may be objected to at any time before the end of the term next after publication.
In stating the grounds on which it is sought to set aside an award, it is not sufficient to state a general head of objection, as "misapprehension of

the terms of the reference." (See *ante*, pl. 3.)—*Allenby v. Proudlock*, 4 D. P. C. 54.

11. (*Delivery of document pursuant to award*.) If an award directs a document to be delivered to several persons, they must all make the demand for it together, or execute a power of attorney authorizing one person to make it, so that the defendant may know the demand to be made by their joint authority.—*Sykes v. Haigh*, 4 D. P. C. 114.
12. (*Finality of award*.) An action of trespass for taking goods was referred, principally with the view of determining the right of property in the goods; the defendants contending that the plaintiff had no property in them, but that they belonged to a third person. Another complaint in the declaration was, that the defendant committed an assault on the plaintiff's wife, *per quod consortium amisit*. The reference was also of all other matters in difference. No evidence was given before the arbitrator to prove the *per quod*, but one assault only was proved to have been committed on the wife, and the plaintiff abandoned his claim to part of the goods. The award merely directed the verdict which had been entered for the plaintiff to stand, and the damages to be reduced to 35*l.*; but made no award respecting the right of property in the goods: Held, sufficiently final.—*Bird v. Cooper*, 4 D. P. C. 148.
13. (*Arbitrator's authority*.) On a reference of all matters in difference, it is for the arbitrator to determine what *are* matters in difference; and therefore it was held that a party to the reference being proceeded against by attachment for not producing certain accounts required by the arbitrators, could not raise by affidavit any question whether those accounts related to the matters in difference or not.—*Arbuckle v. Price*, 4 D. P. C. 174.
14. (*Power of Court to enlarge time for award*.) Where a cause was referred to an arbitrator, who, at a meeting at which the plaintiff and defendant were present, appointed a future day for another meeting, which day was beyond the time allowed for making the award, and the arbitrator by accident omitted to enlarge the time for that purpose, the Court declined to interfere by making a rule to enlarge the time for making the award to the day named.—*Burley v. Stevens*, 4 D. P. C. 255. [The Court proceeded on the ground that the stat. 3 & 4 Wm. 4, c. 42, s. 39, giving the Court power to enlarge the time for making awards, applied only to cases of attempted revocation, but they have since intimated that this impression is altered, and that they think the power given by the statute applies to *all* cases.]

ARREST.

1. A party cannot be held to bail for the arrears of a fee-farm rent issuing out of lands in Scotland.—*M'Kenzie v. Johnson*, 1 Scott, 594.
2. (*Fee, payable on*.) The fee payable by law to the officer from the party arrested is 4*d.* only, the fee prescribed by the 23 H. 6, c. 9. (6 M. & Sel. 220; 2 N. R. 59; 2 B. & Ald. 562; 5 B. & C. 328.)—*Imes v. Levy*, 4 D. P. C. 116.

3. (*Discharge from irregular arrest.*) The Court refused to discharge the defendant out of custody, where he had been arrested by a party not having the warrant in his possession, and had been taken out of the county and detained there two days; the application for relief not being made until twenty-three days after the arrest.—*Fownes v. Stokes*, 4 D. P. C. 125.

ASSUMPSIT.

1. (*Account stated—Money paid.*) An offer of a *cognovit*, after action brought, will not support a count on an account stated.

By a local act, the landlord or receiver of the rents was rendered liable to pay the poor-rates instead of the tenant. By a written agreement, A., the tenant of a house, agreed with B., the landlord, to pay the rent clear of all rates and taxes. A. occupied the premises for some time, and then quitted, leaving the poor-rates and land-tax unpaid. The receiver was compelled to pay the rates, and the succeeding tenant the land-tax, which were repaid to them by B.: Held, that B. could not sue A. for money paid, but that his only remedy was on the special agreement. (6 Bing. 299; 1 N. R. 351; 8 Taunt. 268; 8 T. R. 610, 308; 4 Taunt. 189; 5 B. & Ald. 521; 5 Esp. 171; 5 Bing. 406; 3 B. & C. 789.)—*Spencer v. Parry*, 4 N. & M. 770.

2. (*On undertaking given in judge's order for payment of costs.*) A. having been arrested when he was privileged, as attending on a summons at a judge's chambers, the judge made an order for his discharge out of custody, on condition that if B., the officer who made the arrest, paid A. his costs, to be taxed by the master, A. should not bring any action for the arrest. The costs were taxed and paid. A., however, subsequently obtained an order for the master to review his taxation, which he accordingly did, and allowed A. a further sum for costs. This B. refused to pay, whereupon A. brought an action of *assumpsit* against B., as upon an agreement by him to pay the costs, in consideration that A. would relinquish all right of action against B. on occasion of the arrest: Held, that the action was not maintainable.—*King v. Taylor*, 2 C., M. & R. 235.

ATTORNEY.

1. (*Bill—What are taxable items.*) An attorney employed to transfer stock, found that a *distringas* had been entered at the Bank to prevent the transfer. He thereupon made several inquiries respecting the transactions on behalf of his client, and prepared a notice to the solicitor of the Bank to file a bill in consequence of the writ being entered: Held, that his charges for this business were not taxable items, it not appearing that the *distringas* originated in any suit, or that the business had reference to any proceeding in a Court. And by Patteson, J., if the *distringas* had been in a suit, the steps taken by the plaintiff would not have made taxable items.

Charges for inquiries made, and attendance in the course of such inquiries, relating to a suit of which another attorney had the management, and in which, after such inquiries, the attorney making them did not further interfere, are not taxable items.—*Nicholas v. Hayter*, 2 Ad. & E. 348.

2. (*When compellable to deliver up deeds.*) By a deed of settlement, estates

were conveyed to trustees to the use of A. for life, remainder to such uses as he should by his will direct; with the usual powers for appointment of new trustees. A. devised the estates, with others, to trustees (whom he also made his executors,) in trust to sell, and invest the proceeds, and pay the interest to his wife for her life, and afterwards to stand possessed of the fund in trust for B. and C. equally. A. died, leaving his widow surviving. Two of the executors proved the will. The last surviving trustee in the settlement died, and the legal estate descended to his son as his heir, but the son was never appointed a trustee. Before and after the death of A., an attorney was employed in business relating to the settled and devised estates, for which a sum of money was due to him; and he held the title-deeds. After A.'s death, the son of the trustee under the settlement, and one of the executors, joined in an application to the Court that the attorney might account for all sums received by him in respect of the estates, and deliver up the deeds to the trustees of the same, on payment to him of any thing that might appear to be due from them. The other executor, and all the parties beneficially interested, objected to the application. The Court refused to interpose.—*In re Bunting*, 2 Ad. & E. 467.

3. (*Admission*.) A. gave notice at the commencement of Easter term of his intention to apply to be admitted an attorney, but by mistake the name of a wrong person was stated as the attorney with whom he had served his articles. The Court, on application in Easter term, allowed the notice to be amended, so as to admit him on the last day of Trinity term.—*In re Clarke*, 4 N. & M. 709.
4. (*Practising of unqualified person*.) A person who has been regularly admitted an attorney, but who is off the rolls by reason of his having neglected to take out his certificate for a year, is not an *unqualified person* within the meaning of the 22 G. 2, c. 46, s. 11.—*In re Ross*, 4 N. & M. 763.
5. (*Admission*.) Where, in the notice to apply for admission, the master and clerk were both described as having two Christian names, and in the articles as having one only, the Court, on affidavit of their identity, and that the parties were truly described in the notice, allowed the applicant to be admitted, although the affidavit did not state that the parties were *usually known* by their true names.—*Ex parte Croft*, 5 N. & M. 58.
6. (*Taxation of bill*.) A client was held entitled to have his attorney's bill taxed, though he had expressed his satisfaction with the amount, and paid a sum on account, and four years had elapsed since the delivery before he applied for an order to tax.—*Woollaston v. Weston*, 4 D. P. C. 3.
7. (*Attachment against for nonpayment of money*.) Where a rule of Court requires a client to pay a certain sum of money, an attachment cannot be obtained against his attorney for its nonpayment.—*Poole v. Watkins*, 4 D. P. C. 11.
8. (*Re-admission*.) A notice by an attorney on the last day of one term, to apply for re-admission in the next, is not sufficient, although the notice remains up throughout the vacation.—*Ex parte Cross*, 4 D. P. C. 18.

9. (*Taxation of bill.*) It is no answer to an application to tax an attorney's bill that an agreement was made that the attorney should receive half the proceeds of a suit carried on at the instance of the client.—*In re Masters*, 4 D. P. C. 18.
10. (*Same.*) The Court has no original power to refer an attorney's bill to taxation, except under the authority of the 2 G. 2, c. 23. (2 B. & Ad. 461.) Nor does the attorney waive his right to the jurisdiction of the Court directly to refer his bill for taxation, by attending its taxation before the master, on which, according to the statute, he would be liable to pay the costs of taxation, the client not having given the undertaking required by the statute to pay what should be found due. He will however be liable to refund what should be found overpaid on such taxation.—*Howard v. Groom*, 4 D. P. C. 21; *Doe d. Palmer v. Roe*, *ib.* 95. Nor can the Court direct a bill to be taxed at the instance of any person but the client. *Ibid.*
11. (*Taxation of bill.*) Where a rule for the review of the master's taxation of an attorney's bill had been disposed of, the Court refused afterwards to entertain a motion impugning the bill on the ground of certain charges having been improperly introduced into it instead of into the cash account.
An attorney has a right to introduce into his bill disbursements made by him for his client, though he had no discretion as to their amount, if there be no specific appropriation of money paid by his client to him to such disbursements.—*Harrison v. Ward*, 4 D. P. C. 38.
12. (*Re-admission.*) An attorney who has given the proper notices to apply for re-admission on the last day of one term, cannot apply on these notices for re-admission in the next term. (6 Taunt. 335.)—*Ex parte Mosley*, 4 D. P. C. 69.
13. (*Summary proceedings against.*) Where a party had successfully resisted an action by an attorney for costs, on the ground that he was not retained, the Court would not entertain a subsequent application by the same party to compel the attorney to give up documents which had come to his possession in the course of the business, for doing which the action was brought.—*Ex parte Maxwell*, 4 D. P. C. 87.
14. (*Admission.*) An attorney was admitted, under particular circumstances, without a whole term's notice, for the purpose of practising in New South Wales.—*Ex parte Hulne*, 4 D. P. C. 89.
15. (*Lien.*) The lien of an attorney is co-extensive only with the right of his client, and therefore as between the plaintiff and defendant the lien of the plaintiff's attorney cannot affect the rights of the defendant.—*Simons v. Blake*, 4 D. P. C. 263.
16. (*Admission.*) Where an attorney had given notice of his intention to apply for admission on the first day of a term, and it appeared that some of the necessary entries had not been made, through the neglect of an

agent, in due time for that term, but had been made two days before it, the Court allowed him to be admitted on the last day of term, the entries continuing up, and the notices being duly altered.—*Ex parte Woolright*, 4 D. P. C. 274.

17. (*Same.*) Where an attorney applies for admission in K. B. it must be positively shewn that his notice has been regularly put up in the King's Bench office.—*Ex parte Morgan*, 4 D. P. C. 296.
18. (*Refunding of money paid by client to attorney—Champerty.*) Where a client had voluntarily paid money to his attorney, pursuant to an agreement in itself void for champerty, the Court would not, after a lapse of 13 years, interfere to compel the attorney to refund or deliver his bill, no sufficient reason being shewn for not making an earlier application.—*Ex parte Yeatman*, 4 D. P. C. 304.

AUDITA QUERELA.

The Court will relieve on motion, instead of putting a party to his *auditâ querelâ*, only where the case is quite clear: and therefore, where the plaintiff, after having recovered damages in an action of slander for words imputing felony to him, was attainted of that felony, and the defendant in the action was a witness against him, the Court refused to interfere by staying all further proceedings in the action, though the crown declined to interfere.—*Simons v. Blake*, 4 D. P. C. 263.

BAIL.

1. (*Liability of, in action commenced by original.*) The liability of bail on a recognizance given in an action commenced by original writ, was neither destroyed nor extended by inserting in the declaration new causes of action not included in the writ, and increasing the general claim of damages, and also the amount claimed in the several causes of action stated in the writ. (*Taylor v. Gregory*, 2 B. & Ad. 257.)—*Taylor v. Wilkinson*, 5 N. & M. 189.
2. (*Notice of bail.*) If notice of country bail is given, who are to justify under the old practice, the four days' notice required by the rule of T. 1 W. 4, need not be given.—*Hardbottle v. Clark*, 4 D. P. C. 12.
3. (*Notice of render—Proceedings on bailbond.*) Notice of render having been given to the plaintiff's attorney, he notwithstanding took an assignment of the bailbond, and commenced proceedings, as no notice of bail had been given, and no entry of the render could be found on searching the books: Held, that the proceedings were irregular. (2 C. & J. 683; 2 C. & M. 143.)—*Short v. Doyle*, 4 D. P. C. 202.
4. (*Discharge of, by time given to principal.*) Bail are discharged by time being given to their principal without their consent, though they be not thereby damnified.—*Hannington v. Beare*, 4 D. P. C. 256.
5. (*Notice of bail.*) Notice of justification of bail, where further time has been obtained, must be given before 3 o'clock on the day the order is made. *Newton's bail*, 4 D. P. C. 270.

6. (*Description of residence of bail—Affidavit of justification.*) "Ely, in the county of Cambridge," held a sufficient description of a bail's residence in an affidavit of justification.

It is sufficient for bail to swear himself not to be bail for any "defendant," except in the action wherein he comes to justify.

If he swears to sufficient property "over and above his just debts," [omitting the words "what will pay,"] that is enough. — *Hunt's bail*, 4 D. P. C. 272. See also *Housley v. Boyd*, 1 Scott, 698.

7. (*Payment into Court in lieu of bail.*) A plaintiff is not entitled to receive out of Court money paid in by a defendant in lieu of bail under the 7 & 8 G. 4, c. 71, s. 2, unless judgment has been obtained, or the suit otherwise legally determined. — *Johnson v. Walls*, 4 D. P. C. 315.
8. (*Same.*) Where money has been deposited in Court in lieu of bail, the defendant will not be allowed to plead payment into Court of a less sum, without paying in the money. (4 Moo. & Sc. 472.) — *Ball v. Stafford*, 2 Bingham. N. C.; 4 D. P. C. 327.
9. (*Costs of justification.*) In C. P., after bail are sworn, it is too late to object that the costs of a former unsuccessful attempt to justify are not deposited. — *Knight's bail*, 4 D. P. C. 328.
10. Where the affidavit of justification stated that the deponent's property consisted of a "freehold house, situate, &c." without stating its value, held sufficient. But where the property consists of several items, the practice is (at least in C. P.) to require its value to be stated. — *Housley v. Boyd*, 1 Scott, 699.

BANKRUPTCY.

1. (*Depositions, when conclusive evidence.*) In all actions by assignees of a bankrupt, which the bankrupt himself might have maintained if no bankruptcy had occurred, the depositions before the commissioners are conclusive evidence of the trading, &c., although at the time of the bankruptcy the cause of action was not complete.

The question, whether the action be such as the bankrupt might have maintained, is to be decided by a reference to the *facts* of the case (which the judge may collect from the opening of the plaintiff's counsel) not by a strict reference to the cause of action stated on the *record*. Where, therefore, in trover by assignees, the conversion was laid after the bankruptcy only, it was held that the form of the record did not preclude the plaintiffs from having the depositions taken as conclusive evidence. (2 C. & J. 325; Moo. & Mal. 196; 4 C. & P. 541.) — *Kitchener v. Power*, 4 N. & M. 710.

2. (*Competency of bankrupt as witness—Composition.*) A party made a composition with his principal creditors, paying the smaller ones in full. He afterwards became bankrupt, and did not pay 15s. in the pound: Held, that (having obtained his certificate and released his surplus) he was a competent witness to support an action by his assignees. (15 East, 619; 1 M. & Selw. 182.) — *Roberts v. Harris*, 2 C. M. & R. 292.

3. (*Fraudulent preference.*) In an action by assignees of a bankrupt to recover money paid by way of fraudulent preference and in contemplation of bankruptcy, it must be shown that the party paying contemplated an actual bankruptcy; it is not sufficient to show that he knew himself to be in a state of insolvency. (5 B. & Ad. 296.)—*Atkinson v. Brindall*, 2 Bing. N. C. 225.
4. (*Invalid Commission—Action by bankrupt against official assignee.*) A commission of bankruptcy issued against the plaintiff, which was invalid for want of a sufficient petitioning creditor's debt. The plaintiff applied to the Court of Bankruptcy to appoint an official assignee, to investigate the sufficiency of the debt, and take care of the property, and the defendant was appointed accordingly, without notice that the commission was disputed: Held, that the application made by the plaintiff did not preclude him from suing the defendant for money had and received under the commission. (9 B. & C. 577; 6 Esp. 20, 61; 5 B. & C. 155.)—*Munk v. Clark*, 2 Bing. N. C. 299.
5. (*Second commission—Liability of attorney under first commission—Lien.*) The defendant held a deed of lease, on which he had a lien for 300*l.*, as attorney to S. In December 1819, a fiat in bankruptcy issued against S., and defendant acted as attorney to the fiat: and in 1831, after a notice of a petition to supersede it, he joined with the assignee in a sale of the lease, and out of the proceeds the 300*l.* was paid to him. In 1832 the fiat was superseded for want of a good petitioning creditor's debt, and a new one issued: Held, that the defendant was liable to refund to the assignee under the second commission, in an action for money had and received, the 300*l.*, and also money received in 1831 for rent, &c., accruing to S. (3 B. & Ad. 357, 354.)—*Clark v. Gilbert*, 2 Bing. N. C. 342.

BASTARD.

- (*Appointment of guardian by mother.*) A mother cannot legally appoint a testamentary guardian of her natural child; and therefore such a guardian, if appointed, cannot have a *habeas corpus* to remove such child from the custody to which it was committed by the mother during her lifetime. (2 Bro. Ch. Ca. 583; 3 Atk. 519.)—*Ex parte Glover*, 4 D. P. C. 291.

BENEFICE.

- (*Dilapidations.*) Under an inclosure act, lands were fenced in, and allotted to the vicar and his successors in lieu of tithes. The vicar died, leaving the fences out of repair: Held, that his executors were liable to be sued by the succeeding vicar for dilapidations. (Lyndw. 254; Gibs. Cod. 753, 789; 10 B. & C. 299.)—*Bird v. Relph*, 4 N. & M. 878.

BILL OF EXCHANGE.

1. (*Consideration—Pleading.*) In an action by the drawer and payee of a bill of exchange against the acceptor, a plea, that the defendant received no consideration from the plaintiff for the acceptance, held bad. (1 Tyr. 84.)—*Graham v. Pitman*, 5 N. & M. 37.

2. (*Pleading—Acceptance in blank.*) Assumpsit for goods sold, &c. Plea, as to 9*l.* 15*s.*, that after the making of the promise, and before the commencement of the suit, the defendant, at the plaintiff's request, drew upon a piece of paper having on it a stamp of 1*s.* 6*d.*, an instrument purporting to be a bill of exchange, without a drawer's name thereto, whereby the defendant was required to pay to such person, or his order, as should place his name thereto as drawer, 20*l.*, two months after date, for value received; which instrument the plaintiff requested the defendant to accept towards payment and satisfaction of the said sum of 9*l.* 15*s.*, and for the plaintiff's accommodation as to the residue; and which the defendant accepted accordingly and delivered to the plaintiff, and thereby became liable to pay to the plaintiff, or to such person as should place his name thereto as drawer, or his order, the sum of 20*l.*, viz., towards payment of the said sum of 9*l.* 15*s.*, and for the plaintiff's accommodation as to the rest; that the plaintiff accepted and received the bill in satisfaction of the sum of 9*l.* 15*s.*; and which bill was due at the commencement of the suit. *Non-assumpsit* as to the residue. Replication, that the bill remained unnegotiated in the plaintiff's hands without any drawer's name to it, and unpaid: Held, on demurrer, that the plaintiff's right to sue for the original debt was, under these circumstances, suspended until the expiration of the two months, and of the instrument's becoming due and being dishonoured.—*Simon v. Lloyd*, 2 C. M. & R. 187.
3. (*Notice of dishonour, evidence of.*) Secondary evidence may be given of a written notice of the dishonour of a bill of exchange, without any notice having been given to produce it. (3 B. & B. 288.)—*Swain v. Lewis*, 2 C. M. & R. 261; 4 D. P. C. 261.
4. (*Pleading—Alteration after acceptance.*) An alteration in a bill of exchange after acceptance, may be taken advantage of on a plea that the defendant did not accept the bill.—*Cock v. Corwell*, 2 C. M. & R. 291; 4 D. P. C. 187.
5. (*Pleading—Consideration.*) In an action on a bill of exchange for 98*l.* 5*s.* 3*d.*, by a second indorsee against the acceptor, the pleadings admitted that the acceptance and first indorsement were without consideration, and the issue was whether the plaintiff gave value for the indorsement to him. He relied in the first instance on the mere production of the bill, but on the defendant's objecting that he was bound to prove consideration, he gave evidence of a debt to the amount of 57*l.* due to him from the first indorser, and of another debt to the amount of 20*l.* 18*s.* due to him from his immediate indorser, for goods sold: Held, that he was entitled to a verdict only for the latter amount.
 Lord Abinger C. B., and Bolland B., expressed their opinions that the indorsement does not of itself *prima facie* import consideration in the case of an accommodation bill, but that the holder is bound to prove consideration in the first instance.—*Simpson v. Clarke*, 2 C. M. & R. 342. [See L. M. vol. 14, p. 141. In *Percival v. Frampton*, 2 C. M. & R. 180, Alderson, B. expressed his adhesion to the opinion of Parke J. in *Heath v. Sansom*.]

6. (*Pleading—Consideration—Replication de injuriâ.*) Indorsee against drawer of a bill of exchange. Plea, that the defendant's indorsement was in blank; that the defendant delivered the bill to A. (not a party to it), only to get it discounted for him; that A. fraudulently, and in violation of that special purpose, delivered it to B. to secure a debt due from him to B.: of all which the plaintiff had notice: Held, on general demurrer, that the plea was bad for not showing distinctly that the defendant never had value for the bill.

Semble, that a replication to such plea, "that the defendant broke his promise without the cause alleged by him in his plea," is good.—*Noel v. Rich*, 2 C., M. & R. 360; 4 D. P. C. 228.

7. (*Pleadings.*) In an action by the indorsee against the acceptor of a bill, who had negotiated it with the drawer's name indorsed, the Court refused to allow the defendant to plead that it was not indorsed by the drawer to the plaintiff.—*Gilmore v. Hague*, 4 D. P. C. 303.

And see LIMITATIONS, Statute of, 2; PLEADING, 8; PROMISSORY NOTE.

BUILDING ACT.

- (*Treble costs under.*) *Semble*, that in order to entitle a defendant to treble costs under the Building Act, 14 G. 3, c. 78, s. 100, it is not necessary for the defendant to enter a suggestion on the roll. At all events, it need not be done before taxation. (See *Finlay v. Seaton*, 1 Taunt. 210.)—*Wells v. Ody*, 2 C., M. & R. 184.

CANAL ACT.

- A local act for making a canal enacted, that the rates, tolls, and duties, authorized to be taken by the company of proprietors, should not at any time thereafter be charged with or be liable to the payment of any parochial rates whatsoever; and that the company should *from time to time* be rated to all parochial rates for and in respect of the *lands and grounds* to be purchased or taken, and the warehouses or other buildings *to be erected* by the company in pursuance of the act, in such and the same proportion as, but not at any higher value or improved rent than, other lands, grounds, and buildings, lying near or adjacent thereto, *were or should, for the time being, be rated*, and as the lands, grounds, &c. so to be purchased, &c. would have been rateable, in case they *had continued in their former state*, and had not been used for the purpose of the navigation.

Held, first, that the canal company were liable to be rated at the *fluctuating* value of the adjacent lands and buildings, and not at the value which they bore when the act was passed.

Secondly, that the value of the adjacent lands was to be estimated from *whatever* source it might arise, and that the increase of value arising from the formation of the canal was not to be excluded from the calculation.—*Rex v. Monmouthshire Canal Co.*, 5 N. & M. 68.

CARRIER.

- In an action against carriers, on an issue that the plaintiff's goods were stolen by the defendants' porter, the plaintiff proved circumstances of suspicion, which probably would not have insured a conviction on an indictment for

felony; but the defendants having omitted to call the porter as a witness, and the jury having found for the plaintiff, the Court refused a new trial.—*Boyce v. Chapman*, 2 Bing. N. C. 222.

CERTIORARI.

1. (*To remove indictment.*) The Court of K. B. removed an indictment by certiorari from the Central Criminal Court, at the instance of the defendant, on the suggestion that it involved points of law arising out of proceedings in Chancery relative to matters of account.—*R. v. Wartnaby*, 2 Ad. & E. 435.
2. (*Removal of judgment from inferior Courts.*) *Semble*, that the 19 G. 3, c. 70, s. 4, does not authorize the removal from an inferior Court of a judgment obtained by a defendant.—*Batten v. Squires*, 4 D. P. C. 53.

CHAMPERTY. See ATTORNEY, 9, 18.

CHURCHWARDEN.

A rule for a mandamus to the archdeacon to *swear in* a churchwarden, is absolute in the first instance; at all events, where there is no rival candidate, and no reason assigned for the refusal to administer the oath.—*R. v. Archdeacon of Lichfield and Coventry*, 5 N. & M. 42; *Ex parte Lowe*, 4 D. P. C. 15.

And see SLANDER, 2.

COGNOVIT.

1. (*Taxation of costs upon.*) In the Exchequer, where the defendant gives a *cognovit*, the costs may be taxed before judgment is signed; and if by the terms of the *cognovit* the plaintiff is at liberty to tax costs and sign judgment, but signs his judgment before the costs are taxed, the judgment is irregular.—*Wilson v. Northern*, 4 D. P. C. 212.
2. (*Attestation.*) It is a sufficient compliance with the rule of H. T. 2 W. 4, s. 72, if the attorney who is called in by a defendant in custody to witness a *cognovit*, makes the declaration required by the rule *viva voce*.

Where a defendant is in custody on a *cognovit* which it is alleged has been satisfied, the Court will refer it to the Master to see whether anything is due on it, but will not discharge the defendant.—*Wilson v. Price*, 4 D. P. C. 213.

CONTRACT OF SALE.

(*Measure of damages in assumpsit for non-delivery of goods pursuant to contract.*) In *assumpsit* for breach of contract in not delivering a quantity of linseed pursuant to a contract of sale, it appeared in evidence that the plaintiffs, pursuant to contract, had paid part of the purchase-money to the seller in advance; that the latter, at the time when the linseed ought to have been delivered, gave notice of his inability to perform the contract; but the money was not returned until after the action was commenced, when the amount was paid into Court, with interest up to the time when it was so paid in, as a condition for a commission to examine witnesses abroad; and was only obtained out of Court by the plaintiffs a short time

before the trial. Held, that in estimating the damages, (the plaintiffs not having proved that they had sustained any damage by the non-delivery of the seed and the non-return of the money,) they were not entitled to take the price of linseed at the time of the trial as a criterion; and that the repayment of the money advanced, with simple interest upon it, and payment of the difference between the contract price and the price of the linseed at the time when it ought to have been delivered, was all to which the plaintiffs were entitled.—*Startup v. Cortazzi*, 2 C. M. & R. 165.

COPYHOLD.

(*Surrender by feme covert.*) By the custom of a manor, a surrender by a wife is inoperative without the husband's consent expressed in the surrender and admittance. A surrender made by a wife without the husband's consent being expressed on the face of the surrender, cannot be presumed to be made with his consent, against a person who does not claim under the surrender, even where the husband has no beneficial interest whatever in the property surrendered.—*Doe d. Shelton v. Shelton*, 4 N. & M. 857.

And see DEVISE, 4.

COSTS.

1. (*Under 43 G. 3, c. 46.*) On motion for costs under 43 G. 3, c. 46, though the defendant need not prove malice, the onus of proving want of probable cause lies on him; but it is sufficient if he establishes a *prima facie* case which is not satisfactorily answered. A great disproportion between the sum recovered and the amount sworn to, is a sufficient *prima facie* case; and it is no answer to say, that but for the death of one material witness, and the absence of another abroad, he could have proved a debt to the full amount. For a party ought not to arrest another when he knows that he has not proper evidence of the debt.—*Nicholas v. Hayter*, 2 Ad. & E. 354; 4 N. & M. 882.
2. (*On demurrer.*) *Semble*, that rule 7, H. T. 4 W. 4, giving the costs of particular issues to the successful party, does not apply to demurrers.—*Farley v. Briant*, 5 N. & M. 58.
3. (*Under 43 G. 3, c. 46, s. 3.*) Where a plaintiff recovers a sum less than the amount for which he arrested and held to bail the defendant, and it appears that his only probable cause of action was not bailable, being for unliquidated damages, the defendant is entitled to costs.—*Beare v. Pinkus*, 4 N. & M. 846.
4. (*On indictment for misdemeanor.*) A party was bound over to prosecute at the sessions, in a case within the 7 G. 4, c. 64, s. 23, but which was prosecuted at the assizes. Witnesses were called on subpoenas from the clerk of assize. Held, that they were entitled to an order for their costs under the statute. *Quære*, whether the prosecutor was so entitled. (8 B. & C. 420.)

But the Court will not compel by *mandamus* the treasurer of a town or county to obey the order of the judge of assize for payment of costs

- under that statute. (6 T. R. 168; 1 Chit. Rep. 650; 4 M. & S. 515; 2 B. & Ald. 646; 2 M. & S. 80.)—*R. v. Jeyes*, 5 N. & M. 101.
5. (*Of several defendants.*) Where a verdict passes against some of several defendants, and for others, the latter are entitled to their aliquot proportion of the whole costs incurred, and not merely to 40s. each. (2 Tyrw. 757.)—*Griffiths v. Jones*, 2 C., M. & R. 333; 4 D. P. C. 159.
 6. (*Of foreign commission.*) The costs of executing a commission abroad, under 1 W. 4, c. 22, s. 4, are costs in the cause, unless some special ground is laid for ordering otherwise.—*Prince v. Samo*, 4 D. P. C. 5.
 7. (*Attachment.*) If facts are stated in support of an application for an attachment, from which it may be presumed that the party has received notice of the contents of the rule and *allocatur*, and of the demand thereon, and on showing cause against the rule such knowledge is not denied, the Court will direct the attachment to issue.—*Bottomley v. Belchamber*, 4 D. P. C. 26.
 8. Where, in an action on the case, a defendant succeeds on one of several issues, which goes to the foundation of the plaintiff's cause of action, he will be entitled to the general costs of the cause, although there is a verdict for the plaintiff on the plea of not guilty, without damages.—*Frankum v. Lord Falmouth*, 4 D. P. C. 65.
 9. (*Under 43 G. 3, c. 46.*) On an application for a defendant's costs under this act, the *onus* of showing that the arrest was without reasonable and probable cause is on the defendant, but the Court will not inquire whether the finding of the jury was correct.
It need not appear that the arrest was *malicious*.—*Twiss v. Osborne*, 4 D. P. C. 107.
 10. (*Of turning special case into special verdict.*) Where a special case, on which judgment had been given for the plaintiff in C. P., was at the defendant's instance turned into a special verdict, that he might obtain the judgment of a Court of Error thereon, the Court of C. P. refused, after the lapse of two years, to allow the plaintiff the costs occasioned thereby.—*Collins v. Gwynne*, 4 D. P. C. 122.
 11. (*Under 43 G. 3, c. 46, s. 3.*) Where there was a *boná fide* dispute as to the right of the defendant to claim a set-off; held, that though the arbitrator awarded in favour of the defendant in respect of the set-off, and thereby reduced the plaintiff's claim a third, the defendant was not entitled to his costs under the 43 G. 3, c. 46, s. 3.—*Cawthorne v. Cawthorne*, 4 D. P. C. 182.
 12. (*Judge's certificate in trespass.*) The Court will not review the propriety of a judge's certificate to deprive the plaintiff of costs in an action of trespass, where he had the *power* to certify.—*Twigg v. Potts*, 4 D. P. C. 266.
 13. Where some issues are found for the defendant, the Court has no power to add to the rule for taxation a clause "that the costs, when taxed, be paid by the said plaintiff to the said defendants."—*S. C.*
 14. (*Security for costs.*) The statement that the plaintiff is *resident* abroad

is not sufficient to compel him to give security for costs, unless it be shown that his absence abroad is of a permanent character.—*Frodsham v. Myers*, 4 D. P. C. 280.

And see ARBITRATION, 3, 8; ASSUMPSIT, 2; BUILDING ACT; EXECUTOR AND ADMINISTRATOR, 2, 6, 7.

COUNTY RATE.

All business relating to the assessment, application, and management of the county rate must be transacted by the justices in open court; but no rate payer, or other person not a member of the Court, is entitled to interfere in any way with the exercise of the jurisdiction of the justices in respect of such assessment. Therefore, a rate payer present at an adjourned sessions held for the purposes of allowing the accounts, &c. to be charged upon the county rate, is not entitled to inspect such accounts, &c. previously to their allowance; although such accounts, &c. were inspected, examined, and the amounts adjusted at a *private* meeting of justices held previously to such adjourned sessions, and at such sessions the accounts, &c. were allowed on the *total* amounts thereof, and the names of the parties to whom due being openly read in Court.

Semble, That a rate payer is entitled to inspection of such accounts, &c. on application on a day *subsequent* to their allowance.—*Re v. Justices of Nottingham*, 5 N. & M. 160.

COUNTY COURT.

The sheriff is a constituent part of the County Court, and acts as such in issuing process of execution, and is not liable for the wrongful act of the bailiff done in the execution of such process. (6 Co. Rep. 11 a; 2 B. & Ald. 473; M. & Malk. 52.)—*Tunno v. Morris*, 2 C., M. & R. 299; 4 D. P. C. 224.

And see PLEADING, 2.

COURT OF REQUESTS ACTS.

The defendant may now apply to have a suggestion entered under a Court of Requests Act, to deprive the plaintiff of costs, notwithstanding final judgment may have been signed, if the motion is made as early as can be, and particularly if it appears that the costs have not been taxed. (1 D. P. C. 598; 2 D. P. C. 611; 2 C., M. & R. 246.)—*Godson v. Lloyd*, 4 D. P. C. 159.

COVENANT.—See OYER.

CRIMINAL INFORMATION.

On an application for a criminal information against A. for challenging B., the affidavit stated, that in a correspondence between them A. had intimated his intention, after the settlement of accounts between him and B., to require from B. an apology, or else "such satisfaction as was usual between gentlemen," for certain offensive expressions contained in a letter from B. to A.; that afterwards, C., a relation of A., came with a letter from B. in his hand, settled the account by paying B. a balance due from A., and after saying that he had come in consequence of the letter in his

hand, delivered a hostile message as from A. This affidavit was held insufficient to connect A. with the challenge.

But the Court granted a rule against C.—*Rex v. Younghusband*, 4 N. & M. 850.

DAMAGES.—See **CONTRACT OF SALE**; **TROVER**, 2.

DEBT.

(*When maintainable against heir or devisee.*) To maintain an action of debt against the heir and devisee, under 3 W. & M. c. 14, the debt must have accrued to the plaintiff in the lifetime of the devisor. And if the declaration does not show that it so accrued, and the defendant pleads that the devisor died before the cause of action accrued, he is entitled to judgment; either on the ground that the declaration is defective for want of such allegation, or (if such an allegation may be implied,) that it is a material one, and well traversed by the plea. (7 East, 121; 3 Burr. 1380; 8 Bing. 402.)—*Farley v. Briant*, 5 N. & M. 42.

DEVISE.

1. (*Shifting uses—Effect of recovery in barring such uses.*) Devise to A. for life, remainder to trustees to preserve contingent remainders, remainder to E., the son of A., in tail; with similar limitations to B., C. and D. and their respective issue. Proviso, that if the title of Earl of S. should come to A., B., C. or D., or their sons, within the period of the lives of the said A., B., C. or D., or within the term of twenty-one years after the decease of the survivor of them, then and in such case, as and when the title should come and fall into possession to him or them, the estate which he or they should then be entitled to in the devised estates should cease and determine, and the same should immediately thereupon go to the person or persons who, under the limitations aforesaid, should then be next in remainder expectant on the decease and failure of issue male of the person to whom the title should so descend or come, in the same manner as such person or persons so in remainder would take the same by virtue of the devise, in case he or they to whom the title should come and fall in possession as aforesaid was or were actually dead without issue. A. and E. suffered a recovery. The title of Earl of S. descended on A.

Held, first, that the proviso attached to each of the estates created by the will as they should successively vest in possession.

Secondly, that its effect was not to let in the son of a tenant for life on whom the title might descend, but to carry the estate over to the next branch of the family.

Thirdly, that the uses to arise by the proviso were not barred by the recovery. (2 Salk. 570; Cro. Eliz. 792; 4 Sim. 65; 8 Taunt. 845; Sugd. Pow. App. 4; Co. Litt. 203 b, note 1; 1 Sand. Uses, 436, notes.)—*Doe d. Lumley v. Earl of Scarborough*, 4 N. & M. 724.

2. The case of *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621; 2 N. & M. 619; (L. M., vol. xii. p. 172); was affirmed on error in the Exchequer Chamber.—*Gallini v. Doe d. Gallini*, 4 N. & M. 894.

3. Devise of "all my freehold and leasehold, and all my money, securities, stock, goods, chattels, and all other my property whatsoever, to hold unto and for the use of A., her heirs, executors, administrators, and assigns:" Held to pass testator's copyhold property. (11 East, 290.)—*Edwards v. Barnes*, 2 Bing. N. C. 252.
4. The case of *Pearce v. Vincent*, (1 Cro. & M. 598; 11 L. M. 196;) being sent for the opinion of the Court of C. P., that Court also held that T. P. took an estate in fee.—*Pearce v. Vincent*, 2 Bing. N. C. 328.

ECCLESIASTICAL COURT. See PROHIBITION.

EJECTMENT.

1. A party who obtains possession of land by fraud cannot dispute the title of those from whom he obtained possession, until he has restored the possession so obtained. (4 N. & M. 25.)—*Doe d. Johnson v. Baytrup*, 4 N. & M. 837.
2. (*Consent rule—Amendment—Costs.*) Twelve defendants in ejectment entered into a joint consent rule, not specifying the premises for which they severally defended. At the assizes the judge made an order that the record should be amended, by allowing two of the defendants to withdraw their plea, and suffer judgment by default. The trial proceeded; those two defendants did not appear, but the other ten made out a complete defence for themselves: Held, that the order did not virtually operate as an amendment of the consent rule; and that the plaintiff was, notwithstanding the order, entitled to a verdict against all the defendants. But the Court directed that the ten defendants who went to trial should be allowed the costs of their defence on taxation. (2 B. & Ad. 948; 2 Ad. & E. .)—*Doe d. Bishton v. Hughes*, 2 C., M. & R. 281.
3. (*Judgment in ejectment, when conclusive—What costs recoverable as mesne profits.*) A judgment in ejectment is not *conclusive* evidence of title in the action for mesne profits, unless it be pleaded by way of estoppel. Therefore, under a plea (to a declaration in the ordinary form,) that the premises in the declaration mentioned were not the premises of the plaintiff, it was held that the defendant might give evidence of title in himself, though he had let judgment go by default in the ejectment. (2 Burr. 665; 3 East, 346; 2 B. & Ald. 602.)
Where there is judgment by default in an ejectment, the plaintiff may, in the action for mesne profits, recover all the expenses he has been necessarily put to in the ejectment, and is not limited to the taxed costs as between party and party. (1 Esp. 358; 7 B. Moore, 471.)—*Doe v. Huddart*, 2 C., M. & R. 316.
4. (*Service.*) Service on the administratrix of the last tenant in possession is not sufficient, unless it appears that she is the tenant in possession.—*Doe d. Rigby v. Roe*, 4 D. P. C. 14.
5. (*Same.*) The tenants in possession were three sisters; it did not appear that they were joint tenants. The service was on two on the premises, and a copy was left for the third, with the usual explanation. A rule nisi

was granted, to be served at the house where the three sisters resided.—*Doe d. Grimes v. Roe*, 4 D. P. C. 87.

6. (*Judgment against casual ejector.*) The practice of allowing judgment to be signed against the casual ejector, where the term has elapsed in which the appearance is required, and before which the service was effected, applies to country causes only. (1 D. P. C. 495; 2 D. P. C. 196.)—*Doe d. Greaves v. Roe*, 4 D. P. C. 88.

The Court of C. P., however, under the same circumstances, granted a rule nisi in a town cause.—*Doe d. Wilson v. Roe*, ib. 124.

7. (*Letting in landlord to defend.*) In the absence of any suggestion of collusion between the lessor of the plaintiff and the tenant, the Court refused to set aside a regular judgment in ejectment after execution, in order to let in the landlord to defend. (3 Taunt. 506; 4 Taunt. 820.)—*Doe d. Thomson v. Roe*, 4 D. P. C. 115.
8. (*Service—Vacant possession.*) Service on the tenant by affixing the declaration on the door of the house, no person being therein, held insufficient.—*Doe v. Roe*, 4 D. P. C. 173.
9. (*Service.*) Service of the declaration in ejectment on the tenant's daughter before the term, and an acknowledgment by the tenant within the term, held sufficient to ground a motion for judgment against the casual ejector.—*Doe d. Smith v. Roe*, 4 D. P. C. 265.
10. (*Same.*) Service on a party on the premises, who said he was the agent of the tenant, who was abroad: Held sufficient for a rule nisi for judgment against the casual ejector.—*Doe d. Treat v. Roe*, 4 D. P. C. 278.

ELECTION. See EXCISE OFFICER.

ELECTION PETITION.

(*Costs of opposing—Appointment of committee.*) The Court will not allow judgment to be entered up, under 9 Geo. 4, c. 22, on the certificate of the Speaker of the House of Commons, for the costs of opposing an election petition, when it appears on affidavit that the certificate was founded on the report of a select committee, which was not duly appointed according to the provisions of that act.

Where a party who has presented a petition to the House of Commons complaining of an undue return, does not appear at the time appointed for taking the petition into consideration, or within an hour afterwards, a committee for the trial of the merits of the petition cannot be elected, but the petition should be discharged.—*Bruyeres v. Halcomb*, 5 N. & M. 149.

ESCAPE.

(*Evidence of.*) A return of *cepi corpus et paratum habeo*, together with a statement at the sheriff's office that there was no bail-bond, is evidence of an escape.—*Neck v. Humphrey*, 4 N. & M. 707.

ESTOPPEL.

(*By recitals in deed.*) A party to a conveyance is not estopped by recitals contained in other deeds through which the title so conveyed is derived.—*Doe d. Shelton v. Shelton*, 4 N. & M. 857.

EVIDENCE. See **BANKRUPTCY**, 1, 2; **BILL OF EXCHANGE**, 3; **LEASE**; **LOARDS' ACT**, 1.

EXCISE ACTS.

(*Information on.*) A count in an information to recover a penalty of 100*l.* against a maltster, on the statutes 7 & 8 Geo. 4, c. 52, s. 1, and c. 53, s. 18, charged, that the defendant made use of a cistern for the making of malt, without having made a true and particular entry thereof in writing with the officer of excise in whose district it was intended to be used: Held bad, the count being framed on the latter act, when the penalty was given only by the former.

In an information on the 7 & 8 Geo. 4, c. 52, s. 40, the count charged that the defendant fraudulently concealed and conveyed from the sight of the officers of excise a large quantity of corn for making into malt, contrary, &c. Held, that the count was good, and that it was not necessary to name the officers from whom it was concealed, or to allege that it was concealed from the officers in whose district the premises were situate.—*Att. Gen. v. Dyer*, 2 C. & M. 664.

EXCISE OFFICER.

(*Keeper of excise office, whether incapacitated from voting at election.*) *Quere* whether, since the statute 4 & 5 W. 4, c. 51, the keeper of an excise office is an officer of excise within the meaning of 7 & 8 G. 4, c. 53, s. 9, so as to be liable to the penalties imposed thereby on such officers for voting at elections for members of parliament. *Semble*, not.—*Goodyay v. Clark*, 2 C. M. & R. 272.

EXECUTOR AND ADMINISTRATOR.

1. (*Probate stamp, whether evidence of assets.*) On an issue on *plene administravit*, the stamp on the probate of the testator's will is *admissible* in evidence: but it is not in effect even *prima facie* evidence of assets come to the hands of the executor. And *per* Patteson and Coleridge, J., the lapse of a long period of years would not make it such; *secus per* Lord Denman, C. J. (1 Carr. & P. 180; 5 B. & C. 328; 4 B. & Ad. 657).—*Mann v. Lang*, 5 N. & M. 202.
2. (*Costs.*) A successful defendant is entitled to costs in an action by an executor commenced before, but not tried till after, the passing of the 3 & 4 W. 4, c. 42.—*Grant v. Kemp*, 2 C. & M. 636.
3. (*Action against, for legacy.*) E. by will bequeathed, subject to debts and legacies, the residue of his personal estate to his executor, upon trust to divide the same into two equal parts, and to divide one of such parts into six equal shares, and to pay one of such shares unto each of his cousins E., T., J., W., and J. H., and the remaining share as therein mentioned; and appointed M. his executor, who proved the will. M. called a meeting of the residuary legatees, at which J. H. was present, and exhibited an account, charging himself with assets, and paid some of the legatees the greater portion of their share of the residue, and was about to pay J. H., but was prevented from doing so by a creditor of J. H. Another meeting was afterwards called, at which J. H. was not present, when the exe-

cutor exhibited another account, charging himself with assets, and crediting himself with payments and disbursements, and amongst others, with having paid "cash for legacy duties." To this was appended a supplemental account containing, amongst others, the following item:—"By cash retained for J. H. 179l. 10s.;" Held, that J. H. could maintain an action against M. for money had and received, and on an account stated, to recover the amount of his share of the residue. (Cowp. 284, 289; 5 T. R. 690; Peake's N. P. C. 73; 7 B. & C. 542; 3 East, 120; 1 Moo. & P. 209; 3 Bos. & P. 162; 1 Ventr. 120; 1 B. & B. 219.)—*Hart v. Minors*, 2 C. & M. 700.

4. (*Plene Administravit*—*Judgment of assets quando*.) On a plea of *plene administravit*, where the plaintiff elects to take judgment of assets *quando acciderint*, he is entitled to judgment both for debt and costs. (Tidd, 980, and Appendix, 188; 1 Chit. Rep. 629, n.)—*Cox v. Peacock*, 4 D. P. C. 134.

5. (*Proof of assets*.) The defendant, as executrix, pleaded, no assets (without any averment of *plene administravit*): plaintiff replied, assets in hand: Held, that upon this issue the defendant might show assets exhausted by payment; and the jury having found that to be the case, the Court refused to grant a new trial, or to enter judgment *non obstante veredicto*. (2 Wms. Saund. 220 a, note 3; 2 Williams on Executors, 1211; 4 Mod. 296.)—*Reeves v. Ward*, 2 Bing. N. C. 235.

6. (*Costs against*.) The Court refused to exonerate an administrator plaintiff from costs, where the defendant, in an action on a bond and for goods sold, obtained a verdict by showing his discharge under the insolvent debtor's act.—*Engler v. Twisden*, 2 Bing. N. C. 263.

7. (*Costs*.) The decision of a judge at chambers, under 3 & 4 Will. 4, c. 42, s. 31, as to executor's costs, is not final, but may be reviewed by the full Court.—*Larkin v. Massie*, 4 D. P. C. 239.

And see LEGACY DUTY; PLEADING, 5.

EXTENT. See SHERIFF, 2.

FLEET PRISON.

Under the rule of H. 3 G. 2, the Warden of the Fleet is authorised to confine in the strong room of the prison a prisoner for debt, who has been charged with a felony.—*Exparte Angle*, 2 Bing. N. C. 318.

FORCIBLE DETAINER.

(*Conviction for, form of*.) A conviction for a forcible detainer, under 8 H. 6, c. 9, must show an *unlawful entry* as well as a forcible detainer. And therefore a conviction, which stated an information and complaint of an unlawful ejection and forcible detainer, but in which the justices professed to convict only on their own view of the forcible detainer, was held bad. Justices cannot convict of a forcible detainer on their own view, without evidence that the entry was also unlawful. (4 B. & Ad. 307; 2 Lord Raym. 1514; 3 Lord Raym. 360; 1 Salk. 156, 353, 540; Hawk. P. C. b. 1. c. 28.)—*R. v. Wilson*, 5 N. & M. 164.

FOREIGN ATTACHMENT. See TROVER, 1.

HIGHWAY.

1. (*Allowance of surveyor's accounts.*) An allowance of surveyor's accounts at special sessions is irregular, if they have not first been carried before one justice, though the vestry did not desire it, and though no notice was taken of the omission on the accounts being discussed at the special sessions. (5 B. & C. 816.)—*R. v. Goodenough*, 2 Ad. & E. 463.
2. (*Exemption from statute duty.*) A charter of Queen Elizabeth, confirmed by Charles I., exempting the tenants of certain ancient demesne lands from the payment of *road money* (*chimagin*): Held not to exempt them from the performance of statute duty on the highways, pursuant to 13 G. 3, c. 78, and subsequent acts. (3 Mod. 96.)—*Rex v. Siviter*, 5 N. & M. 125.

HUSBAND AND WIFE.

(*Action brought without husband's authority.*) Where an action was brought in the name of husband and wife, without the husband's authority, for an assault on the wife, the husband was held entitled to stay the proceedings until he received an indemnity against costs.—*Harrison v. Almond*, 4 D. P. C. 321.

And see COPYHOLD.

ILLEGAL CONTRACT.

A foreigner selling and delivering goods abroad to a British subject, may recover the price, though he knew at the time of the sale and delivery that the buyer intended to smuggle them into this country. (Cowp. 341; 3 B. & Ad. 221.)—*Pellecat v. Angell*, 2 C. M. & R. 311.

INDICTMENT. See CERTIORARI, 1.

INSOLVENT.

An insolvent cannot be held to bail after his discharge; for a debt included in his schedule, and in pursuance of an agreement made before his discharge, for the purpose of withdrawing a threatened opposition. (8 B. & C. 421; 1 N. & M. 69; 6 Car. & P. 13; 2 D. P. C. 375.)—*Gould v. Williams*, 4 D. P. C. 91.

INSURANCE.

1. (*After knowledge of loss—Execution of policy—Stamp.*) A policy of insurance on a ship, "lost or not lost," executed after the ship is known by all parties to be lost, in pursuance of a previous agreement to insure, is valid. (5 Burr. 2802; 6 Ves. 349.)

By the rules of an Insurance Association, insurances were to commence on the day on which the ship was *accepted* by the committee, and to continue in force for twelve months: Held, that a ship accepted in February, and lost in June, was well insured by a policy executed in October: and that no objection arose to its admissibility in evidence on the stamp act, 35 G. 3, c. 63. (3 Campb. 103, 127.)

A letter of attorney was given to execute policies in conformity with the rules of the association: Held that such letter of attorney authorized the execution of the above policy.—*Mead v. Davison*, 4 N. & M. 701.

2. (*Particular average—Stranding.*) Goods were insured (including risk of craft) free of average, unless general, or the ship should be stranded. By the stranding of a *lighter* conveying the goods from ship to shore, a particular average loss was incurred: Held, that the insurers were not liable.—*Hoffman v. Marshall*, 2 Bing. N. C. 383.
3. (*Condition precedent—Payment into court—Seaworthiness.*) Policies effected in a mutual insurance club contained this memorandum: "All ships are to be inspected and approved by, a committee of the club before admission. All ships hereby insured to be well found, &c., and otherwise in a seaworthy state, as to the committee or their inspector shall from time to time seem meet. *All chain cables to be properly tested.* All ships to be subject to survey by the committee or their surveyor, at such times as the committee shall think proper, and subscribers neglecting to get such repairs done to their ships as shall from time to time be ordered by the committee or their inspector, after notice, to be uninsured until the same shall be done." Held, in an action on such a policy for a total loss, that the clause respecting chain cables was merely directory on the committee, and did not create a condition precedent, imposing on the assured the necessity of proving that his chain cable had been properly tested.
 Payment of money into Court upon a count on a policy stops the defendant from showing that the vessel was unseaworthy, or that the action was brought too soon.—*Harrison v. Douglas*, 5 N. & M. 180.

INTERPLEADER ACT.

1. Where a sheriff obtains an interpleader rule, calling upon an execution creditor and a third party, who claims goods seized by the sheriff under a *fi. fa.*, to appear and state the nature of their claims, they must respectively appear and state by *affidavit* the nature of the claim.—*Poweler v. Lock*, 4 N. & M. 852.
2. The sheriff cannot apply to the Court unless the money or goods in dispute are actually in his hands. (1 C. & M. 182.)—*Scott v. Lewis*, 2 C. M. & R. 289; 4 D. P. C. 259.
3. (*Costs.*) The sheriff will be allowed his costs of keeping possession after applying to the Court, where it is for the benefit of the parties, and not in furtherance of his duty.—*Underden v. Burgess*, 4 D. P. C. 104.
4. A motion by the sheriff under the act must be made in Court; but cause may be shown at chambers.—*Beames v. Cross*, 4 D. P. C. 122.
5. A contested claim to a reward advertised for the apprehension of a felon cannot be made the subject of an application under the interpleader act.—*Grant v. Fry*, 4 D. P. C. 135.
6. (*Sheriff's costs.*) Where a claimant, after an application under the interpleader act, abandons his claim after an issue directed, the sheriff is entitled to his costs from the time of directing the issue and of the application for costs.—*Scales v. Sargeson*, 4 D. P. C. 231.
7. (*Claim by partner.*) Where a claim is made by a person, as *partner* of the defendant, on property seized by the sheriff, the Court will not grant the sheriff relief under the interpleader act, but will compel the plaintiff

to indemnify the sheriff, if he denies the partnership. (3 B. & P. 288.)—*Holmes v. Mentze*, 4 D. P. C. 300.

And see JUDGE'S ORDER.

JUDGE.

The Court of K. B. will not review a judgment of a judge in the Practice Court.—*Rex v. Sheriff of Devon*, 2 Ad. & E. 296.

JUDGE'S ORDER.

On an application to a judge at chambers, under the interpleader act, an order was made, by consent of all parties, to refer the cause on certain terms to a barrister instead of an issue being directed. The Court refused to grant a rule *nisi* for varying the order, by introducing a fresh term into the reference, in consequence of information which one of the parties (an administratrix) had obtained since the hearing at chambers.—*Drake v. Brown*, 2 C., M. & R. 270.

And see ASSUMPSIT, 2; PRACTICE, 7, 17.

JUDGMENT.

(*Revival of by sci. fa.—Stay of execution.*) If a plaintiff has judgment, with a stay of execution by agreement for a certain period, he may take out execution at any time within a year and day after the end of that period, without a *sci. fa.* to revive the judgment. (2 Saund. 72, c. note; 7 Mod. 64; Rol. Abr. Execution, Scire Facias, N. O.; 2 Inst. 471; 2 Burr. 660; 6 Mod. 14, 288.)—*Hiscocks v. Kemp*, 5 N. & M. 113.

And see CERTIORARI, 2.

JUSTICES.

1. (*Mandamus to, to enforce disputed rate.*) A local act gave power to commissioners to raise money for paving, lighting, watching, and improving a town, by rating and assessing the proprietors of houses according to the value at which they were taxed to the poor. In default of payment a justice was authorized to issue a distress warrant. The act provided also that in case any person considered himself aggrieved by any rate or assessment, he might apply to the commissioners, who were authorized to give relief; and that any person who thought himself aggrieved by any thing done in pursuance of the act might appeal to the quarter sessions. The commissioners assessed a proprietor at an annual value, exceeding that at which he was assessed to the poor, but he did not appeal: Held, that on his refusing to pay, a justice might be required by mandamus to issue a distress warrant against him.—*Rex v. Trecothick*, 2 Ad. & E. 405.
2. (*Same.*) Where, in the case of a similar act, with like powers of appeal, it was also enacted, that if any person should neglect to pay his rate for seven days after demand, it should be lawful for a justice, on proof of the default, by warrant to authorize the collector to levy the rate by distress, and if there were no distress, to commit the party to gaol: Held, that the clause was not obligatory on the justice to issue a warrant without a pre-

vious summons. (6 T. R. 198.)—*Rex v. Justices of Stafford*, 5 N. & M. 94.

And see POOR RATE.

LANDLORD AND TENANT.

(*Use and occupation by assignees in trust for creditors.*) A party, being in insolvent circumstances, assigned over all his estate and effects to trustees for the benefit of his creditors. The insolvent was tenant of a house in which he carried on the business of a grocer. The trustees used the premises for a week, for the purpose of continuing the trade, and then sold the insolvent's effects on the premises. In an action against them for *use and occupation*, the judge left it to the jury to say whether they intended to become tenants to the landlord, or, if not, whether they so acted as to induce him to believe, and whether he did believe, that they meant to become his tenants; and the jury having found for the defendants, the Court refused a new trial. (1 C., M. & R. 172.)—*How v. Kennett*, 5 N. & M. 1.

LEASE.

(*Under power—Exception.*) A tenant for life was empowered to make leases, provided "the ancient and accustomed reservations were thereby reserved," and they were granted "in the same manner and form, and with and under such and the like reservations, covenants, conditions, and agreements, as were usually and customarily contained in leases of the same kind in the respective parishes and places in which the premises are situate." Upon a question on the validity of a lease granted under this power: Held, that other leases of lands in the same parish were admissible in evidence to show that it satisfied the latter proviso.

In former leases a right of re-entry was reserved in the event of there being no overt distress on the premises; in the present the word "overt" was omitted: Held, not to vitiate the lease.

The omission to reserve a heriot, where a heriot had been accustomedly reserved, *would* vitiate the lease. But a reservation of a heriot of "the best good of the person or persons who for the time being should be tenant or tenants in possession of the demised premises," was held good, though the reservation in former leases was "of the best good of A. (the lessee and cestui que vie) or such person as shall be in possession of the premises as tenant by virtue of the lease."

A clause purporting to "reserve and except" to the lessor the power of sporting over the demised premises, operates as a *grant* by the lessee to the lessor of a *right or privilege*, and not as a reservation or exception.

A clause purporting to *reserve* underwoods and underground produce, enures not as a reservation, but as an exception. (Co. Litt. 47 b, 143 a; Shep. Touch. 80; Dyer, 19 a; 2 Man. & R. 335; 2 B. & C. 197.)

Where former leases contained an exception of "all and all manner of timber trees and trees likely to become timber," a lease under the above mentioned power, containing an exception of "all timber trees, bodies of pollard, and other trees whatsoever," granted at the same rent, was held

void, the subject-matter of the demise being increased by the alteration in the exception, and no rent being reserved in respect of such addition. (Co. Litt. 44 b, 46 b; 3 Mau. & S. 99; Cro. Jac. 458; 1 Vent. 338; T. Jones, 110.)

In considering what are the "ancient and accustomed rent and reservations," the proper evidence is the *last* lease previously granted of the premises. (2 Vern. 542; Hardres, 325.)

Quære, whether a reservation of rent *quarterly*, the former leases having reserved it *half-yearly*, would vitiate the lease? (5 Rep. 5, b; Cro. Jac. 76; 6 Rep. 37; Co. Litt. 44, b; Cro. Car. 16; 5 B. & Ald. 363; 4 Tyrw. 185.)—*Doe d. Douglas v. Lock*, 4 N. & M. 807.

LEGACY. See EXECUTOR AND ADMINISTRATOR, 3.

LEGACY DUTY.

1. (*On bequest of money to pay off debts.*) Where a testatrix bequeathed money in trust "to pay off the debts of her first husband, as it was her will that the same should be discharged;" and the monies remaining unexpended to her nephew: Held, that the creditors were bound to pay the legacy duty on their several debts, and that the matter having been overlooked in an order made by the Court of Chancery for the payment of the debts, the executors, who paid the debts in full, and then paid the legacy duty, might recover the amount from the creditors respectively, in an action for money paid to their use.—*Foster v. Ley*, 2 Bing. N. C. 269.
2. A testator devised real estates to trustees for the benefit of several parties for life, and after their death to be distributed among their children, &c.; and the will contained a proviso, by which the testator directed that *it should be lawful* for the trustees to sell the same, as should appear most expedient to them towards the management of his property and affairs. A portion was sold shortly after the testator's death, because being suitable for building, it was advantageous to the estate to sell it; and the remainder, after being subject to the trusts for ten years, was sold under an order of a Court of Equity in a cause: Held, that the money from neither sale was liable to legacy duty. (1 Price, 426; Advocate General v. Ramsay's Trustees, cited 2 C., M. & R. 224.)—*In re Evans*, 2 C., M. & R. 206.

LIEN. See BANKRUPTCY, 5.

LIMITATIONS, STATUTE OF.

1. (*Acknowledgment—Part payment.*) The defendant acknowledged the debt, but added, that "he would have nothing to do with the claim; that he wished the plaintiff would make him a bankrupt; and that he would rather go to gaol than pay him." Held, that it was properly left to the jury to consider whether the acknowledgment was such as that a promise to pay could be implied.

The defendant's agent had instructions to offer the plaintiff a part of the debt in discharge of the whole; the plaintiff refusing to take the money on those terms, the agent paid it in part discharge. Held, that this was

not a part payment by the defendant to take the case out of the statute of limitations.—*Linsell v. Bonsor*, 2 Bing. N. C. 241.

2. (*Part payment, what is.*) If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is part payment, so as to prevent the operation of the statute of limitations.—*Hart v. Nash*, 2 C., M. & R. 337.

LORDS' ACT.

1. (*Ejectment by assignee under.*) In ejectment by an assignee under the compulsory clause, it is sufficient for the plaintiff to produce the assignment by the prisoner, without proving the previous notice: at all events, it is enough to produce also the rule for his discharge.

The assignment is not rendered invalid by an inaccuracy in the declaration of trust. And the general words will pass land of the prisoner not particularly described in his schedule. (2 Smith, 1.)—*Doe d. Milburn v. Edgar*, 2 Bing. N. C. 391.

2. On an application to bring up a defendant under the compulsory clauses of the Lords' Act, service of the notice on a creditor by serving it on the landlady of the house in which he lodged, was held insufficient, it not being sworn that she stated herself to act as the servant of the creditor, and that such statement was believed to be true.—*Wood v. Gompertz*, 4 D. P. C. 277.

MALICIOUS PROSECUTION.

- (*Action for—Probable cause.*) The plaintiff, a servant, was discharged from her service on a Friday, and took away with her from her master's house a trunk and bag, the property of her master. He wrote to her the next day, demanding his property, and threatening to proceed criminally on the Monday following, if it were not restored. The plaintiff being absent from home when the letter was delivered, no answer was returned, whereupon the master, the same day, Saturday, had her taken into custody, but when she was brought before the magistrates on Monday declined to make any charge. In an action for charging plaintiff with felony maliciously and without probable cause: Held, that the judge was warranted in leaving to the jury the existence of probable cause, instead of deciding it himself.—*M^r Donald v. Rooke*, 2 Bing. N. C. 217.

And see PLEADING, 1.

MANDAMUS. See CHURCHWARDEN; JUSTICES; METROPOLIS PAVING RATE; POOR RATE.

MASTER AND SERVANT.

- If a yearly servant be guilty of misconduct which constitutes a sufficient ground of dismissal, and be dismissed, although the misconduct do not form the master's motive for the dismissal, the servant cannot recover wages either for the whole current year or *pro ratâ*. (2 N. & M. 829; 4 Campb. 375; 3 N. & M. 177.)

After a general hiring at a yearly salary, payment and acceptance of the salary by quarterly payments is evidence of a subsequent contract to pay

and receive quarterly.—*Ridgway v. Hungerford Market Co.*, 4 N. & M. 797.

MESNE PROFITS. See **EJECTMENT**, 3.

METROPOLIS PAVING RATES.

The Court will not grant a mandamus to justices of Middlesex to issue distress warrants for levying paving rates made in any district within the metropolis, but will leave the commissioners, or other persons having the control of the pavements of the district, to their remedy by action under the 57 G. 3, c. 29, s. 38. That act applies as well to those districts wherein the paving commissioners had already, by a local act, a *limited* power of suing for the recovery of the rates, as to other districts.—*Rex v. Justices of Middlesex*, 5 N. & M. 126.

MORTGAGE. See **STAMP**.

NOTARIAL CERTIFICATE.

Under the 6 Geo. 4, c. 87, s. 20, a British consul has the same power as a notary public, to certify that the affidavit in support of the certificate of a married woman's acknowledgment was sworn before a commissioner duly appointed.—*In re Barber*, 2 Bing. N. C. 268.

OFFICE.

(*Title to, before swearing in—Appointment of deputy.*) Edward 1, by charter granted to the burgesses of Carnarvon that the constable of his castle of Carnarvon for the time being should be mayor of that borough, "sworn as well to the king as to the burgesses, who (an oath for preserving the king's rights being first taken,) should swear to the burgesses to preserve their liberties granted by the king, and faithfully to do those things which to the office of mayoralty belonged in the said borough." By letters-patent of George 3, A. was appointed constable of the castle. He took the oath of mayor, and by the operation of 57 Geo. 3, c. 45, and 6 Anne, c. 7, s. 8, was continued in office until six months after the demise of Geo. 4, and by the operation of 1 Will. 4, c. 6, until six months after the passing of that act. Before the expiration of the latter period his present Majesty by letters-patent again granted to him the office of constable: Held, that until oath again taken according to the charter, he could not execute the office, or appoint a deputy. Such oath is an oath of *qualification*, not of *sanction* merely.—*Rex v. Roberts*, 5 N. & M. 130.

OVERSEER.

1. (*Duty of, as to the protection of the poor from contagious disease.*) An overseer is not bound to take precautionary measures against the small pox by causing the poor to be vaccinated. And even if he has, by direction of the vestry, agreed that the poor shall be vaccinated at the expense of the parish, and refuses to fulfil that agreement, a criminal information cannot be obtained against him, although, in consequence, the contagion of the small pox has spread, and many of the poor have died.—*Anon.* 5 N. & M. 12.

2. (*Proof of appointment of.*) Averment that plaintiff *had been appointed*

assistant overseer, that he had passed certain accounts of him the said plaintiff as such overseer, and had verified them on oath: Held, sufficiently proved by evidence that he had acted as assistant overseer under a warrant of appointment signed by the magistrates; that he had kept the accounts of the parish in a book headed "Overseers' Accounts," and that he had verified those accounts on oath.—*Cannell v. Curtis*, 2 Bing. N. C. 228.

3. (*Conviction of under Poor Law Act, consequences of.*) Where an overseer has been rendered incompetent to serve in consequence of a conviction under the 4 & 5 Will. 4, c. 76, s. 97, an application cannot be made for a *mandamus* to compel him to deliver up books, &c. belonging to the parish, until the conviction has been drawn up; and it must be annexed to the affidavits in support of the rule.—*Rex v. Simms*, 4 D. P. C. 294.

OYER.

Where a declaration in covenant sets out the deed according to its legal effect, and the defendant sets it out on oyer *in hæc verba*, he cannot demur to the declaration on the mere ground of *variance*; because the deed, as set out on oyer, becomes part of the declaration. (Carth. 301, 513; 2 Saund. 366; 1 B. & C. 358; 4 B. & C. 741.)—*Paine v. Emery*, 2 C., M. & R. 304; 4 D. P. C. 191.

PAYMENT INTO COURT. See INSURANCE, 3; PLEADING, 9.

PARTNERSHIP. See INTERPLEADER ACT, 7.

PLEADING.

1. (*In case for malicious prosecution.*) The Court refused to permit the defendant to plead not guilty, and also that he had probable cause to indict. The plea of not guilty (under the new rules) puts in issue both the fact of prosecution, and the want of probable cause.—*Cotton v. Brown*, 4 N. & M. 831.
2. (*Double pleas—Pleading in County Court—Discontinuance.*) To debt in the County Court the defendant pleaded *nil debit*, and also "by leave of the Court" a set-off: Held, that the latter plea was surpiusage, and need not be noticed either by the plaintiff or the Court; for the 4 & 5 Anne, c. 16, does not extend to inferior courts not of record. Where, therefore, in such case, the plaintiff joined issue on the first plea, and had a verdict and judgment thereon, the Court of K. B., on a writ of false judgment, affirmed the judgment; for the Court of Error will take judicial notice that a County Court cannot give leave to plead double.

The rule that duplicity in pleading must be taken advantage of by special demurrer, does not apply to the case of two distinct pleas pleaded without leave.

The stat. 32 Hen. 8, c. 30, providing that a discontinuance shall be cured by verdict, applies only to Courts of Record.—*Chitty v. Dendy*, 4 N. & M. 842.

3. (*In trespass.*) In trespass *de bonis asportatis* for the removal of several chattels, a plea justifying the removal *quia* damage feasant, enures as a separate plea in respect of each chattel, and the plaintiff may reply *seve-*

rally; for instance, he may traverse the justification as to one chattel, and reply excess as to another. And where the articles are enumerated in several counts, if the identity of the goods in the different counts is not averred, the plaintiff may reply severally as to the goods in each count.

Where there were several of such *sectional* replications to such a plea of justification, and one of them was demurred to for duplicity in putting the *whole* plea instead of a part in issue, by a traverse *absque tali causâ*, instead of *absque residuo causâ*: Held, that this did not affect the validity of the other replications to the same plea. (1 Saund. 27, n.; 2 Saund. 127.)

A replication of excess to a plea justifying *quia* damage feasant, in trespass *de bonis asportatis*, must, before the new rules, have concluded with a prayer of judgment. (1 Saund. 97.)

In trespass *quare cl. freg.* the defendant set out a possessory title in A., giving colour to the plaintiff, and justified as servant of A. The plaintiff replied, *de injuriâ suâ propriâ absque tali causâ*: Held bad for duplicity. (8 Co Rep. 66; Yelv. 157; Cro. Jac. 224; Latch. 221; Comyns' Rep. 582; Willes, 99; Cro. Eliz. 812; Ld. Raym. 639; 1 B. & P. 76; 3 B. & Ad. 2.)—*Vivian v. Jenkins*, 5 N. & M. 14.

4. (*Replication de injuriâ.*) To *assumpsit* on a breach of contract, in not paying for books sold and delivered by bills at certain dates, the defendant pleaded a custom in London, that upon such sales the security need not be given unless required when the books are delivered, and that it was not then required by the plaintiff. The plaintiff replied generally *de injuriâ*: Held, that the plea was in *denial* of the contract declared on, not in *excuse* for the non-performance of it, and therefore that the replication was bad. Held, also, that as the contract was not stated to be in writing, the plea was good.—*Whittaker v. Mason*, 2 Bing N. C. 359.
5. (*Profert of letters of administration.*) In a declaration by an administratrix, the plaintiff made profert of letters of administration, "duly granted by the Consistory Court of St. Asaph," without making the usual statement of the grant of the letters of administration in the body of the declaration: Held bad on special demurrer, as not sufficiently showing that they were granted by the proper authority. Held, also, that the omission of the *date* of the grant was immaterial.—*Hughes v. Williams*, 2 C., M. & R. 331; 4 D. P. C. 169.
6. (*Replication de injuriâ.*) *Assumpsit* to recover 5000*l.* for money had and received. Plea, as to the sum of 5000*l.* in the declaration mentioned, stated to have been received by the defendant to the plaintiff's use, that the money so received by the defendant was the amount of the proceeds of the sale of goods consigned to him by Messrs. P. and C. as their own goods, with the plaintiff's knowledge and assent, (but which in fact were the goods of P. and C. and the plaintiffs jointly,) as a security for any money the defendant might advance to P. and C., with power of sale to reimburse himself for such advances; that he, not knowing that the plaintiffs had any interest in the goods, made advances to P. and C. to the amount of 6000*l.* on the security of the goods, which he afterwards sold;

and he thereby offered to set off the amount of the advances against the damages claimed by the plaintiffs. Replication, *de injuriâ*, and new assignment, that the plaintiffs brought their suit, not only for the proceeds of the sale of the goods mentioned in the plea, but also for money received by the defendant to the plaintiffs' use, being the proceeds of other goods which the defendant, by a letter to the plaintiffs, declared to be under his care on their account: Held, on demurrer, that as the plea was not matter of excuse, but a denial of the promise to the plaintiffs, and also as it claimed an interest in the money, and derived an authority from the plaintiffs, the replication was bad. (8 Co. 66.)

Held, also, that the plea would have been bad on special demurrer.—*Solly v. Neish*, 2 C., M. & R. 355; 4 D. P. C. 248.

7. (*Accord and satisfaction*.) To a declaration in *assumpsit* on a bill of exchange, with the common counts, the defendant pleaded as to 83*l.* parcel thereof, that after the causes of action accrued, an agreement was made between the plaintiff and the defendant, that the defendant should secure that sum by a mortgage on certain property, with powers of sale, part of that money to carry interest at 5*l. per cent.*, and the whole to be paid by instalments; and that the plaintiff agreed that no proceedings should be taken in respect of that sum, unless upon default of payment of the instalments as they should become due; and that the defendant was always ready to execute such mortgage, but had not been called upon to do so: Held bad on special demurrer, as being an attempt to plead accord without satisfaction. (6 Bing. 754.)—*Allies v. Probyn*, 4 D. P. C. 153.
8. (*Pleading issuably, what is.*) A defendant, under terms to plead issuably, in an action against him as acceptor of a bill of exchange by an indorsee, pleaded that he had received no consideration from the plaintiff for his acceptance, and delivered the plea so late in the term that there was not time to have the demurrer argued that term. The Court ordered the plea to be set aside, and that the plaintiff should be at liberty to sign judgment unless the defendant consented to amend on payment of all costs, and go to trial at the next sittings.—*Brown v. Austin*, 4 D. P. C. 161.
9. (*Plea of payment into Court—Joining issue.*) To a declaration on a bill of exchange, with a count for labour, the defendant pleaded, as to 35*l.*, parcel of the money in the first count mentioned, that the bill as to that sum was an accommodation bill; concluding with a verification; and as to 40*l.*, other parcel of the sums of money in the declaration mentioned, payment of that sum into Court, and that the plaintiff had not sustained damages beyond 40*l.*; concluding with a verification; and as to the residue of the sums, and the promise in the last count mentioned, *non assumpsit*. The plaintiff took issue on the first plea, and added a *similiter* to the last, but said nothing as to the plea of payment into Court. The plaintiff had a verdict at the trial, with 30*l.* damages; Held, that there was no ground for arresting the judgment, for that all the pleas might be taken as one plea.—*Fallows v. Bird*, 4 D. P. C. 188

10. (*Payment.*) Declaration containing the common counts. Pleas, as to part, that defendant was not indebted; as to the residue, that he paid it before the commencement of the action, concluding to the country: Held bad on special demurrer. (3 D. P. C. 193).—*Mack v. Rust*, 4 D. P. C. 206.
11. (*Striking out counts.*) A declaration in ejectment on the demise of the churchwardens and overseers of a parish to recover parish property, contained two sets of counts, one specifying the names of the individuals, the other not. The Court ordered the latter set to be struck out.—*Doe d. Overseers of Llandesilio v. Roe*, 4 D. P. C. 222.
12. (*Inconsistent pleas.*) To trespass for seizing goods, the defendant pleaded two pleas, one justifying on a distress for rent due under a demise at 5*l.* a year, and another at 2*l.* 10*s.*, and both issues were found for him: Held, that they were not inconsistent.—*Twigg v. Potts*, 4 D. P. C. 266.
13. (*General issue—Scienter.*) In case for an injury done to the plaintiff's cattle by the defendant's dogs, the plea of not guilty puts in issue not only the fact of the injury, and that the dogs were of a savage disposition, but also the defendant knew them to be so.—*Thomas v. Morgan*, 4 D. P. C. 223.
14. (*Frivolous plea.*) In an action for two years' use and occupation of a house, judgment was signed for want of a plea, but was set aside on an affidavit of merits, pleading issuably, &c. The defendant pleaded, that the two years' rent became due under a lease, and after a fiat had issued against him, and he had been declared a bankrupt; and that after the rent became due, he applied to the assignee to accept or decline the lease, and that the assignee declined the lease, and thereupon the defendant tendered the lease and possession to the landlord, who accepted the same. This plea was pleaded at the end of Trinity term, too late to be argued in that term. The Court, considering the plea frivolous, discharged the rule for setting aside the judgment.—*Worthington v. Prince*, 4 D. P. C. 243.
15. (*Several pleas.*) In an action by the assignees of a bankrupt, the Court allowed the bankruptcy to be put in issue, (the fact being doubtful,) together with a plea of mutual credit, and a plea of payment into Court. The rule is absolute in the first instance.—*Atkinson v. Duckham*, 4 D. P. C. 327.

And see BILL OF EXCHANGE, 1, 2, 4, 5, 6, 7; OYER; PROMISSORY NOTE, 1, 2; SLANDER, 1; TRESPASS, 1.

POOR RATE.

- (*Mandamus to enforce distress for.*) The want of certainty in the specification of some of the property included in a poor rate is no ground for refusing a mandamus to justices to issue warrants of distress for levying the amount of a particular assessment. Such defect is ground of appeal only.

Nor is it any ground for discharging a rule *nisi* for a mandamus to enforce a poor rate which the party has refused to pay, and for which the justices have refused to issue their warrant of distress, that since the rule was granted a third party has tendered to the overseer the amount of the rate.

But it was held a sufficient answer to such application, that at the meeting of justices, when the warrant was demanded, the overseer came under a promise to prove that the occupation of the party rated was beneficial, and failed to do so, whereupon the justices decided against the rate: although the occupation need not, in point of law, be beneficial. The overseer ought to have gone again, and after saying that the occupation need not be beneficial, have demanded the warrant.—*Rex v. Wilson*, 5 N. & M. 119.

POWER. See LEASE.

POWER OF ATTORNEY. See ARBITRATION, 10.

PRACTICE.

1. (*Short notice of trial.*) The defendant was under terms, in a country cause, to take short notice of trial *if necessary*; the pleas were delivered February 19, at half-past seven; on February 27, at the same hour, the replication and issue were delivered, with notice of trial indorsed for the Winchester assizes. On 3d March, the commission day at Winchester, the cause was tried as undefended, the defendant's attorney having given notice that he should treat the notice of trial as a nullity. The Court granted a new trial.—*Pounds v. Penfold*, 5 N. & M. 186.
2. (*Verdict by consent.*) Where a verdict by consent was taken against a defendant, who was present in Court, contrary to his express instructions privately given in Court to his counsel, but he did not openly assert his refusal, or communicate it to the other side, the Court refused to interfere.—*Wright v. Soresby*, 2 C. & M. 671.
3. (*Declaring de bene esse.*) Notwithstanding the rule of Mich. 3 W. 4, s. 11, a plaintiff may still declare *de bene esse* wherever bail have not been perfected, and whether they have been put in or not.—*Baisley v. Newbold*, 2 C. M. & R. 325; 4 D. P. C. 177.
4. (*Notice of trial.*) If the issue be delivered with a notice of trial indorsed for one day, and with it a separate notice for another day, it is an irregularity.—*Kerry v. Reynolds*, 2 C. M. & R. 310; 4 D. P. C. 234.
5. (*Appearance—Time for declaring.*) It is no irregularity to declare before the expiration of eight days after service of the writ of summons, if the defendant has appeared.—*Morris v. Smith*, 2 C. M. & R. 314; 4 D. P. C. 198.
6. (*Affidavit of merits.*) An affidavit of merits is not sufficient, which states that both the defendant and his attorney "are advised and believe" that there is a good defence on the merits.—*Worthington v. —*, 2 C. M. & R. 315.

7. (*Authority of judge at chambers.*) A judge at chambers has power to make an order on an attorney in a cause to pay money, and such order will be made a rule of Court as of course, without a rule to show cause.—*Wilson v. Northop*, 2 C. M. & R. 526.
8. (*Judgment of non pros—Appearance.*) The defendant entered an irregular appearance within the eight days: the plaintiff gave him notice of the irregularity, and he promised to examine and correct it: but instead of doing so, entered a new appearance in the next term as a fresh book, and demanded a declaration; and the plaintiff not declaring in due time, the defendant signed judgment of non pros. The Court held that the irregular appearance might have been corrected in the book, and set aside the judgment of non pros, the costs to be costs in the cause.—*Bate v. Botten*, 2 C. M. & R. 365; 4 D. P. C. 160.
9. (*Judgment as in case of nonsuit.*) Rule for judgment as in case of a nonsuit discharged, on an affidavit from the plaintiff's attorney that he did not add the *similiter*, nor had it been added to his knowledge or belief.—*Martin v. Martin*, 2 Bing. N. C. 240.
10. (*Staying proceedings—Inspection of document.*) The plaintiff, who had delivered to A., as the attorney of B., a bill for work done, in which he charged B. as the debtor, afterwards surreptitiously obtained the bill from A., and delivered a new one for the same work, charging A., and sued A. for the amount. The Court stayed the proceedings until the plaintiff should deliver to A. a copy of the paper surreptitiously obtained from him: the copy to be evidence in the cause.—*Edginton v. Niron*, 2 Bing. N. C. 316.
11. (*Right to begin.*) On a plea of payment (that being the only plea,) the defendant is bound to begin.—*Richardson v. Fell*, 4 D. P. C. 10.
12. (*Judgment as in case of nonsuit.*) Where notice of trial was given for the same term in which issue was joined, but afterwards countermanded: Held, that the defendant might move for judgment as in case of a nonsuit in the next term.—*Dennehey v. Richardson*, 4 D. P. C. 13.
13. (*Same.*) If a defendant, by negotiation, prevents a plaintiff from proceeding to trial in due time after issue joined, he cannot obtain judgment as in case of a nonsuit on account of such delay.—*Watkins v. Giles*, 4 D. P. C. 14.
14. (*Same.*) The poverty of a defendant is not a sufficient cause for not proceeding to trial, unless it appears that the knowledge of it reached the plaintiff after the commencement of the action.—*Fielden v. Crow*, 4 D. P. C. 50.
15. (*Same.*) The insolvency of the plaintiff since the commencement of the action is no answer to a rule for judgment as in case of a nonsuit.—*Frodsham v. Rust*, 4 D. P. C. 90.
16. (*Release of action by one of several plaintiffs.*) Where one of several plaintiffs, assignees of a bankrupt, released the cause of action, and the release was pleaded, the Court (suspicion being thrown on the defend-

conduct in the transaction) set aside the plea, the co-plaintiffs indemnifying the plaintiff who had given the release against costs.—*Johnson v. Holdsworth*, 4 D. P. C. 63.

17. (*Making judge's order rule of Court.*) An application to make a judge's order a rule of Court, and for an attachment for disobeying it, may be made in one motion.—*Hinchliffe v. Jones*, 4 D. P. C. 86.
18. (*Peremptory undertaking.*) A plaintiff who has given a peremptory undertaking to try at a particular sitting is bound to be prepared for that purpose, although the defendant is not ready; and cannot have the undertaking enlarged on that ground.—*Saxon v. Swabey*, 4 D. P. C. 105.
19. (*Striking out demurrer.*) The Court refused to allow a plaintiff to strike a demurrer out of the paper, on the ground of the defendant's bankruptcy since it was set down for argument.—*Flight v. Glossop*, 4 D. P. C. 135.
20. (*Judgment of non pros.*) A defendant being served with a writ of summons, obtained an order for particulars before declaration. After waiting three months, the plaintiff refused to go on with the action, or to enter a *stet processus*. The Court refused an application to compel him to do so, or to enter a judgment of *non pros*.—*Kirby v. Snowden*, 4 D. P. C. 191.
21. (*Judgment for want of plea.*) Judgment was signed in term for want of a plea, where the plea was delivered before 11 o'clock of the day after that on which the time for pleading expired: Held irregular. (3 D. P. C. 265.)—*Leigh v. Bender*, 4 D. P. C. 201.
22. (*Setting aside proceedings for irregularity—Notice of writ of inquiry.*) Judgment was signed in November 1833. The plaintiff took no further step till January 1835, when he gave a term's notice of executing a writ of inquiry. In April, notice of executing it for the 28th of May was served on the defendant in person. On the 27th May the defendant took out a summons to set aside the judgment for having been irregularly signed after plea delivered, returnable the next day at three o'clock, but it was not signed by the plaintiff's attorney. At four o'clock, the writ of inquiry was executed. On the same day, a second summons was taken out, returnable the next day, which was attended and dismissed; and an application was then made to the Court to set aside the judgment and subsequent proceedings for irregularity: Held, that the defendant was too late; and that the summons to set aside the judgment was not, under the circumstances, sufficient to stay the trial of the writ of inquiry.—*Roberts v. Cuttill*, 4 D. P. C. 204.
23. (*Judgment as in case of nonsuit.*) Where the cause was called on whilst the plaintiff's attorney's clerk was absent from the Court in consequence of an application to amend, and the record was therefore withdrawn, but the cause was set down again immediately for trial, and afterwards the defendant obtained a rule *nisi* for judgment as in case of a nonsuit, while the cause was still in the paper, the Court discharged the rule with costs.—*Wolsey v. Edwards*, 4 D. P. C. 236.

24. (*Action brought without authority.*) Where a defendant was sued for the price of goods after he had received a letter from the plaintiff, who was abroad, not to pay except to his written order, the Court, on the application of the defendant, ordered proceedings to be stayed on the money being brought into Court, although the defendant had pleaded the facts by way of defence.—*Newton v. Matthews*, 4 D. P. C. 237.
25. (*Amended particulars of demand, effect of acceptance of.*) A declaration in assumpsit, indorsed to plead in four days, being delivered with particulars of demand annexed, the plaintiff, two days afterwards, finding that the particulars were wrongly entitled, delivered a fresh particulars properly entitled; and for want of a plea within the four days, signed judgment: Held, that the acceptance of the amended particulars was a waiver of the objection to the first, and that the judgment was regular.—*Jones v. Fowler*, 4 D. P. C. 232.
26. (*Inspection of corporate books.*) The circumstance of an attorney being a burgess does not entitle him, in an action against the corporation for costs, to inspect the corporate books in order to prove his retainer.—*Stevens v. Mayor of Berwick-on-Tweed*, 4 D. P. C. 277.
27. (*Affidavit of service.*) An affidavit of service must swear to the service of "the rule annexed, and not merely the rule in the cause."—*Fidlett v. Bolton*, 4 D. P. C. 282.
28. (*Rule for quashing scire facias.*) The rule for quashing a *sci. fa.* on the application of the plaintiff, after appearance and before plea, is *nisi* in the first instance, although on the terms of paying costs. (1 B. & Ald. 486.)—*Ade v. Stubbs*, 4 D. P. C. 282.
29. (*Judgment as in case of nonsuit.*) It is no objection to an application for judgment as in case of a nonsuit, that issue was joined seven years previous.—*Cromer v. Brown*, 4 D. P. C. 288.
30. (*Intitling declaration.*) It is irregular to entitle a declaration of the Court on the back of it only.—*Rippling v. Watts*, 4 D. P. C. 290.

PRISONER.

1. (*Charging in execution.*) By the practice of the K. B., a side-bar rule does not operate to charge a party as in execution, unless he be in custody on the particular suit when the rule is taken out. Where, therefore, A. was, in 1821, in custody at the suit of B., and C. who had obtained a judgment against A. in another action, took out a side-bar rule for the marshal to acknowledge A. in custody, and A. was brought up in custody by *habeas corpus* in May 1835, and charged in execution at the suit of C.: Held, that he had not been properly charged in execution previously to that time; nor was then properly charged; inasmuch as it did not appear that C. had either revived his judgment by *sci. fa.*, or taken out execution within a year after the judgment. And such proceeding by side-bar rule is not only *irregular*, but *inoperative* and *void*, and cannot be set up by waiver or lapse of time. (Tidd, 363; 5 T. R. 254.)

In a record of commitment, it was stated that A. was brought up and charged in execution at the suit of C. The form of the record is the

- same whether the party is charged in execution by side-bar rule or by *habeas corpus*: Held, that A. was not estopped from saying that he was not brought up by *habeas corpus*.—*Smith v. Sandys*, 5 N. & M. 59.
2. (*Charging in execution, time for.*) Judgment was signed in Michaelmas vacation; on the last day of Hilary term a warrant to take the defendant on a *ca. sa.* was delivered to the deputy in London of the sheriff of Denbighshire: Held, that the defendant was charged in execution in due time.—*Williams v. Waring*, 2 C. M. & R. 354; 4 D. P. C. 200.
 3. (*Discharge of small debtor.*) If a prisoner, seeking his discharge under 48 G. 3, c. 123, for a debt not exceeding 20*l.*, has not given ten days' notice of his application, the rule for his discharge will be only *nisi* in the first instance.—*Moore v. Clay*, 4 D. P. C. 5.
 4. A defendant taken in execution cannot obtain his discharge on the ground that the plaintiff had not carried in the judgment roll before issuing execution.—*Deemer v. Brooker*, 4 D. P. C. 9.
 5. The rule for bringing up a defendant from criminal custody on a *hab. corp. ad testificandum*, is *nisi* only in the first instance. (4 East, 587.)—*Rex v. Pilgrim*, 4 D. P. C. 89.
 6. (*Charging in execution with attachment.*) The proper mode of charging a defendant, who is a prisoner in the custody of the marshal, with an attachment, is by lodging it with the sheriff, who will take the defendant upon the attachment as soon as he is out of the custody of the marshal.—*Boucher v. Sims*, 4 D. P. C. 173.
 7. (*Discharge of small debtor.*) In order to obtain a discharge under 48 G. 3, c. 123, it is not sufficient that the notice should be left "with a female at the plaintiff's residence."—*George v. Fry*, 4 D. P. C. 273.
 8. (*Same.*) Where a defendant seeks to obtain his discharge under the 48 G. 3, c. 123, the plaintiff being dead, he must serve the notice on the personal representative of the deceased, or show that there was no personal representative, before a notice to the attorney of the plaintiff will be considered sufficient.—*Ex parte Richer*, 4 D. P. C. 275.
 9. (*Same.*) A defendant is entitled to his discharge under the 48 G. 3, though he has been out occasionally on day rules during the twelve months.—*Bouhey v. Webb*, 4 D. P. C. 320.

And see *AFFIDAVIT*, 5.

PROCESS.

1. (*Distringas—Entering appearance.*) The Court refused to allow the plaintiff to enter an appearance for the defendant after *distringas*, on an affidavit which only stated generally that diligent search was made to find the defendant, and that the deponent was unable to find him at his place of abode, or any of his goods or chattels. The affidavit ought to specify the places at which, and the persons of whom, inquiry was made.—*Copeland v. Nevill*, 5 N. & M. 172.
2. (*Description of defendant in capias.*) "F. H. late of Devonshire Terrace, New Road," held a sufficient description in a *capias*, where it appeared

that the party had been found by that description, and that he had no settled residence at the time of the arrest, and no other means of identification appeared. (2 D. P. C. 498, 505.)—*Hill v. Harvey*, 2 C. M. & R. 307; 4 D. P. C. 163.

3. (*Issuing of ca. sa. whether countermand of fi. fa.—Returning fi. fa.*) The plaintiff sued out a *fi. fa.* into Bedfordshire, and lodged it in the office of the deputy under-sheriff in London. On the receipt of it the under-sheriff wrote to say that the defendant had no effects; the plaintiff thereupon immediately sued out a *ca. sa.*, and lodged it at the same office. Before the return of the *fi. fa.*, finding that the defendant had effects, the plaintiff's attorney wrote to the under-sheriff not to execute the *ca. sa.* Held, that the sheriff was bound to return the *fi. fa.* And *semble*, the issuing of the *ca. sa.* was not a countermand of the *fi. fa.*—*Smith v. Johnson*, 2 C. M. & R. 350; 4 D. P. C. 208.
4. (*Indorsement on ca. sa.*) In debt on bond in a penalty of 312*l.* the *ca. sa.* was indorsed to satisfy 188*l.* 9*s.*, with further interest on 156*l.* until paid. Held sufficient.—*Williams v. Waring*, 2 C. M. & R. 354; 4 D. P. C. 200.
5. (*Writ of summons, indorsement on—Description of attorney plaintiff.*) It is sufficient to describe an attorney plaintiff, in the indorsement on a writ of summons, as "of" a particular place, without stating him to *reside* there. And his place of business is the proper residence of which to describe him.
Semble, that if he were described of his private dwelling house, where he did not carry on his business, that would be sufficient also.
 An alteration in the *order* of the words of the indorsement, or the addition of others, is immaterial, if the sense remains the same.—*Yardley v. Jones*, 4 D. P. C. 45.
6. (*Dated on Sunday.*) A writ of summons dated on a Sunday is a nullity, and the objection is not waived by lapse of time. And the Court is bound to take judicial notice that a particular day of the month falls on a Sunday.—*Hanson v. Shackelton*, 4 D. C. P. 48.
7. (*Distingas—Entering appearance for defendant.*) On the sheriff's return of *non est inventus* and *nulla bona* to a writ of *distingas*, if it appears that the defendant keeps out of the way to avoid his creditors, the Court will allow an appearance to be entered for him; but will not in the same action give leave to stick up notice of declaration in the office.—*Copeland v. Nevill*, 4 D. P. C. 51.
8. (*Indorsement on capias.*) The Court will not discharge a defendant out of custody on a testatum *ca. sa.* on the ground of the want of an indorsement on the original *ca. sa.* pursuant to the rule of H. 2 & 3 G. 4.—*Davidson v. Dunne*, 4 D. P. C. 119.
9. (*Indorsement on writ of summons.*) "No. 1, Clifford's Inn Passage, Fleet Street, London," held to be a good description of the party by whom the writ was issued, without naming any parish. (2 D. P. C. 145, 221.)—*Arden v. Jones*, 4 D. P. C. 120.

10. (*Returning writ.*) The plaintiff's attorney obtained from the sheriff's deputy in London a warrant, which he sent to an officer in the country by post, without paying the postage: the officer in consequence refused to take the letter in, and it was returned to the dead letter office: Held that, under these circumstances, the sheriff could not be called on to return the writ.—*Hart v. Weatherly*, 4 D. P. C. 171.
11. (*Distringas—Entering appearance.*) After a *distringas* has been executed, and the sheriff has returned that he has levied 40s., an appearance may be entered by the plaintiff for the defendant without an affidavit.—*Page v. Hemp*, 4 D. P. C. 203.
12. (*Variance between writ and declaration.*) A writ was to answer the plaintiff in "a special action;" the declaration was "on promises." A rule to set aside the declaration for irregularity was discharged with costs.—*Moore v. Archer*, 4 D. P. C. 214.
13. (*Distringas.*) Where it was clear that the defendant kept out of the way to avoid service, the Court granted a *distringas*, though three calls and two appointments had not been made.—*Hickman v. Dallimore*, 4 D. P. C. 278.
14. (*Same.*) A *distringas* cannot be had, where all the calls were on the same day.—*Cross v. Wilkins*, 4 D. P. C. 279.
15. (*Form of writ of summons.*) "Tufton Street, in the County of Middlesex," held a sufficient description of the defendant's residence in a writ of summons.
The omission of the word "as" before "promises" in the description of the form of action, was also held immaterial.—*Cooper v. Wheale*, 4 D. P. C. 281.
16. (*Variance between writ and declaration.*) Where a plaintiff sues out a *capias* against two, and arrests one only, he cannot declare against him alone.—*Carson v. Dowding*, 4 D. P. C. 297.
17. A *capias* may be issued into a county different from that in which the writ itself describes the defendant as resident; and proceedings to out-lawry founded on such a writ are regular. (1 Tidd, Pr. 132.)—*Morris v. Davies*, 4 D. P. C. 316.
18. (*Alteration of writ.*) A plaintiff cannot alter his writ after service, and a notice not to appear to the copy of the writ first served, will not cure the defect.—*Glenn v. Wilks*, 4 D. P. C. 322.
19. (*Time for objecting to irregularity of writ.*) If a copy of a writ is served in vacation, an objection to it for irregularity must be taken in vacation, if there is time for that purpose.
An objection to a notice of declaration on the ground of variance from the writ, must be taken within four days from the time of serving the notice, whether in term or vacation, or partly in each. And an intermediate Sunday counts as one of those days.—*Hinton v. Stevens*, 4 D. P. C. 283.

PROHIBITION.

(*To Ecclesiastical Court.*) The temporal Courts cannot entertain a question whether, in a particular cause admitted to be of ecclesiastical cognizance, the *practice* of the ecclesiastical court has been regular. The temporal courts can prohibit any particular proceeding in an ecclesiastical suit only where such proceeding is contrary to the general law of the land, or manifestly out of the jurisdiction of the court.—*Exparte Smyth*, 5 N. & M. 145.

PROMISSORY NOTE.

1. (*Pleading—Consideration.*) Action by indorsee against indorser of a note. Plea, that the defendant *had no consideration* for his indorsement, and that the next indorser indorsed to the plaintiff *without any consideration*, and that the plaintiff held it *without consideration*: Held, bad on demurrer. *Trinder v. Smedley*, 5 N. & M. 138.
2. (*What is.*) An instrument, whereby A. promises to pay B. a sum of money by instalments, but which is to become void on B.'s death, is not a *promissory note*, but an *agreement* to pay on a contingency. (1 Burr. 227; 5 T. R. 482; 2 Campb. 205, 417; 2 B. & Ad. 660; 4 B. & Ad. 619.)

Therefore, where a plaintiff declared on such an instrument, describing it as *an agreement or instrument in writing*, whereby the plaintiff promised to pay, &c.; and the agreement being set out, appeared on the face of it to be called a "note of hand:" a plea, that the defendant did not make the said supposed *promissory note* in the declaration mentioned, was held bad on special demurrer.—*Worley v. Harrison*, 5 N. & M. 173.

3. (*Notice of dishonour.*) The plaintiff received from the defendant, in payment for goods, a promissory note indorsed by the defendant, but not made payable to order: the note having been dishonoured by the maker: Held, that the plaintiff was entitled to recover the price of the goods, notwithstanding he had omitted to give the defendant due notice of the dishonour of the promissory note. (1 Salk. 133; 6 T. R. 123.) *Plimley v. Westley*, 2 Bing. N. C. 249.
4. An indorser of a promissory note not overdue, but the amount of which is exceeded by a cross demand of the maker on the payee, having notice of such demand at the time of the indorsement, cannot recover against the maker advances made to the payee on the note after such notice, although the note was a distinct transaction between the original parties. (10 B. & C. 558; 3 T. R. 80; 7 T. R. 423; 1 Campb. 19.)—*Goodall v. Ray*, 4 D. P. C. 76.

And see BILL OF EXCHANGE.

RECOVERY. See DEVISE, 1.

REPLEVIN.

(*Taking insufficient sureties.*) In case against the sheriff for taking insufficient sureties in replevin, he is liable to the extent of the penalty of the

bond given by the sureties. (2 H. Bl. 36, 547; 1 Taunt. 218.)—*Paul v. Goodluck*, 2 Bing. N. C. 220.

SCIRE FACIAS.

If a plaintiff issues a second *sci. fa.* on one judgment, and in the declaration on such second *sci. fa.* he misrecites the proceedings on the prior one, he may abandon that, amend, and proceed on the original judgment.—*Klos v. Dodd*, 4 D. P. C. 67.

And see JUDGMENT; PRACTICE, 28.

SESSIONS.

(*Conclusive jurisdiction of, in criminal cases.*) On the trial of an indictment at the Quarter Sessions, that Court is the sole judge of the propriety of the entry of the verdict. Where, therefore, on a special finding by the jury, which amounted in fact to an acquittal, the chairman directed a verdict of guilty to be entered, the Court of King's Bench refused to grant a mandamus requiring the minutes of the verdict to be amended according to the finding. The only course open to the prisoner is to apply for a pardon.—*Rex v. Justices of Suffolk*, (*Exp. Bewes*), 5 N. & M. 139.

SET-OFF. See SHIPPING.

SETTLEMENT.

(*Apprenticeship—Binding by parish.*) Under the 43 Eliz. c. 2, the overseers of a parish are empowered, with the assent of two justices, to bind apprentice a child of parents legally settled and resident in and chargeable to the parish, though the child himself be at the time of the binding resident out of the parish, and not a burthen on it; and that to a master resident out of and unconnected with the parish. (2 T. R. 726.)—*Rex v. Inhabitants of St. George, Exeter*, 5 N. & M. 61.

SEWERS.

All persons, whose property derives any advantage from the works of the commissioners of sewers, may be assessed to the sewers' rate in respect of that property. And property drained by sewers originally made and always repaired by persons independent of the commissioners of sewers, and deriving no *immediate benefit* from the works of the commissioners, may be assessed by reason of the general benefit and advantage resulting from such property being thereby accessible, and of its approaching and neighbouring public ways being properly drained and cleansed.

By 52 G. 3, c. 48, s. 7, all persons are liable to be rated to the sewers' rate, as occupiers of premises rateable thereto, who are *de facto* rated in respect of such premises to the poor rates of the parishes to which that act applies.

Apartments in Somerset House appropriated to the office of the commissioners for auditing the public accounts were held rateable by the commissioners of sewers for the city of Westminster and parts of Middlesex, although Somerset House is declared by act of parliament (15 G. 3, c. 33, s. 16,) to be vested in the crown, free from all incumbrances, for

the purpose of establishing within the same divers public offices, among which is that above-mentioned.—*Soudy v. Wilson*, 4 N. & M. 777.

SHERIFF.

1. (*Form of proceedings in action by.*) A *ca. sa.* sued out by a plaintiff who is the sheriff of the county into which it issues, should be directed to the coroners; but the fact that the plaintiff is sheriff need not appear on the face of the writ.

Where a prisoner is charged in execution under such writ, it is no objection that the proceedings have not been entered of record.

The defendant being detained for debt in the gaol of the county of D., a *ca. sa.* at the suit of the sheriff of D. issued, directed to the coroners of D., and was lodged with the gaoler of the county gaol. To a writ of *hab. corp. cum causá*, these facts were returned, together with a certificate, signed, "A. B. one of the coroners of D.," that the copy of the *ca. sa.* set out in the return, was a true copy: Held, that it must be taken that the writ came to the gaoler through the coroners in proper course.—*Bastard v. Trutch*, 5 N. & M. 109; S. C., 4 D. P. C. 6, *nomine Barston v. Trutch*.

2. (*Poundage on extent.*) Under a writ of extent for penalties under the excise laws, the sheriff levied goods of the defendant of the value of 824*l.* A negotiation took place; the sheriff remained in possession, and ultimately the crown accepted 500*l.* in satisfaction of the penalties, which amounted to 1000*l.*: Held, that the sheriff was entitled to poundage only on 500*l.*—*Rex v. Robinson*, 2 C. M. & R. 334.

And see COUNTY COURT; ESCAPE; INTERPLEADER ACT; PROCESS, 10; REPLEVIN; TROVER, 2.

SHIPPING.

- (*Articles—Action for wages—Deductions.*) Where a seaman, about to proceed on a trading voyage, entered into and signed articles, whereby he agreed not to sue for wages any of the owners, except one, who was the captain, and who alone was a party to the articles: Held, that he could not sue the other owners, although they sold and received the proceeds of the cargo, and one of them, the managing owner, adjusted the wages, and settled with the seamen.

The plaintiff's wages were adjusted, and the balance struck, subject to certain deductions for insurance and interest on advances made to him before and during the voyage. It was proved that such charges were the usual ones in trading voyages, and that the accounts were always made out so. The plaintiff remonstrated against these deductions, but ultimately accepted the balance, and gave a receipt for the whole wages: Held, that he could not recover the amount of such deductions. So also, where, in another voyage, he had stipulated for a ninetyeth share of the net proceeds of the cargo on a whaling adventure, in lieu of wages, and was charged with insurance on such share.

Held also, that such deductions need not, under the circumstances, be made the subject of a set off.—*M'Auliffe v. Bicknell*, 2 C. M. & R. 265.

SLANDER.

1. (*Plea of privileged communication.*) In an action of slander, the plea of privileged communication must allege that the defendant made the communication on a lawful occasion, believing it to be true, and *without malice*; or at least, *bonâ fide*.—*Smith v. Thomas*, 2 Bing. N. C. 372.
2. (*Of churchwarden—Property in bell-ropes.*) The property of the bell-ropes of a parish church is in the churchwardens; therefore, to say of the churchwarden that he stole the bell-ropes of his own parish is not actionable. (Hawkins's Pl. Cr., Appeals, s. 44.)—*Jackson v. Adams*, 2 Bing. N. C. 402.

SMUGGLING.

1. (*Summary conviction for.*) An information charged that the defendant, not being a subject of his majesty, was, on 28th October, 1834, found on board a vessel within a port of the United Kingdom, and within one league of the coast thereof, such vessel being liable to forfeiture under an act relating to the customs: Held, that a conviction for a pecuniary penalty on this information was bad: for the 3 & 4 W. 4, c. 53, s. 48 did not make it an offence in a foreigner to be on board such vessel *within any port* except those of the Isle of Man; and the offence thereby created, of being on board such vessel within one league of the coast of the United Kingdom, was done away with, so far as regarded pecuniary penalties, by the 4 & 5 W. 4, c. 13.—*Rex v. Pereira*, 2 Ad. & E. 375.
2. (*Illegal unshipment of goods, what is.*) In an information founded on the 6 G. 4, c. 108, s. 45, the first count charged the defendant with assisting and being otherwise concerned in unshipping goods liable to the duties of customs, the duties not having been paid or secured. The second count charged that goods liable to duty, which had been unshipped without the duties having been paid and secured, came to the hands and possession of the defendant, he well knowing the same to have been illegally unshipped; and the third count charged him with knowingly harbouring and concealing goods liable to the payment of duty, he well knowing that they had been illegally unshipped. It was proved on the trial that the goods were received from a boat in the Downs, a mile or two from the shore, within the limits of the port of Dover, into a hoy hired by the defendant at that port for receiving them, and that they were brought in that hoy into the Thames, and were there seized by the customhouse officers in the port of London: Held, that the information was sustained by the evidence, inasmuch as it showed that the defendant at Dover, and therefore clearly within the United Kingdom, was "concerned in the shipping" by hiring the hoy.
Held, also, that even supposing that the defendant's act of assistance or concern in the shipment must be considered to have taken place, through the agency of the master of the hoy, at the place where the unshipment was made, viz. in the Downs, and that such place was not "within the United Kingdom," in the sense ascribed to those words in the 6 G. 4, c. 108, s. 45; yet when the master of the hoy, being the defendant's

agent, brought the goods into the port of London, the defendant was properly charged as having them in his possession within the United Kingdom.—*Attorney-General v. Tomsett*, 2 C. M. & R. 170.

3. A vessel which comes within a league of the United Kingdom, having had contraband goods on board in the same voyage, though she has unshipped them before coming within the league, is liable to forfeiture under the 3 & 4 W. 4, c. 53, s. 2.—*Attorney-General v. Schiers*, 2 C. M. & R. 286.

STAMP.

(*Transfer duty on mortgage*.) The transfer duty on mortgages is imposed by the 55 G. 3, c. 184, & 3 G. 4, c. 117, s. 1, only where no further sum is advanced. Where a further sum is advanced, it is sufficient to pay the *ad valorem* duty on the sum advanced. So also, where the original mortgage was for a term, and the second deed is a mortgage in fee, with the assignment of the term to secure the mortgage money.—*Doe d. Bartley v. Gray*, 4 N. & M. 719.

SUBPOENA. See WITNESS, 1, 5.

TRANSFER OF DEBTS.

The plaintiff sought to recover 50*l.* from the defendant on the account stated, and gave evidence of an admitted account between them, in which that sum appeared as an item against the defendant, and of payment of interest in respect of it, and promises to pay the principal. The defendant proved that the debt arose out of a written undertaking on his part (which he had obtained from the plaintiff and destroyed) "to remit the plaintiff 50*l.*, which sum he (the defendant) held of H. P., and by him authorized to pay" the plaintiff; and called H. P., who swore that he never authorized the defendant to pay the money for him, and that he had since settled all his accounts with the plaintiff: Held, that the defendant was not precluded from giving this evidence, and that, if believed, it entitled him to a nonsuit.—*Pierce v. Evans*, 2 C. M. & R. 294.

TRESPASS.

1. (*Replication de injuriâ — Excess*.) Trespass for assault and battery. Plea, that plaintiff was defendant's apprentice, and conducted himself improperly, wherefore defendant moderately chastised him. Replication, *de injuriâ*: Held, that on these pleadings the plaintiff could not recover on the ground of the chastisement being excessive; for the replication *de injuriâ* put in issue only the *cause* alleged in the plea; that is, whether the plaintiff misconducted himself as an apprentice. (Gillb. Hist. C. P. 154; 11 Mod. 43; 5 B. & Ald. 220; 4 N. & M. 469; 3 B. & Ad. 1; 1 C. & J. 291.)—*Penn v. Ward*, 2 C. M. & R. 338; 4 D. P. C. 215.
2. (*Pleadings in.*) To a declaration in trespass for assaulting plaintiff, and with a stick and with his fists giving the plaintiff blows and strokes, the defendant pleaded as to *assaulting* the plaintiff with the said stick and with his (the defendant's) fists giving him the blows and strokes as in

the declaration mentioned, *son assault demesne*. It was proved that the defendant struck the plaintiff a blow with the stick: Held that the plea sufficiently justified that *battery* as well as an assault with the stick.—*Blunt v. Beaumont*, 4 D. P. C. 219.

And see COSTS, 12; PLEADING, 3.

TROVER.

1. (*Conversion*.) Where property was attached in the hands of the defendant under a foreign attachment against A., in an action of trover by B., the real owner: Held, that the refusal of the defendant, the garnishee, to deliver it up, was no proof of a conversion by him.—*Ferrall v. Robinson*, 4 D. P. C. 242.
2. (*Damages in.*) The defendant, a sheriff, who held goods taken in execution, delivered them up to the plaintiffs (assignees of a bankrupt), who had commenced an action of trover for them; and the plaintiffs accepted them without condition: Held, that they could not recover more than nominal damages; at all events, not without alleging special damage in the declaration. (Sid. 225; 1 Rol. Abr. 5, L. pl. 1; 4 T. R. 264; 1 C. & M. 544; 1 Car. & P. 626.)—*Moon v. Raphael*, 2 Bing. N. C. 310.

VENUE.

In an action on a specialty, an application to change the venue cannot be made till after issue joined. (3 B. & C. 552.)—*Youde v. Youde*, 4 D. P. C. 32. Nor in a local action.—*Bell v. Harrison*, ib. 181.

VESTRY ACT.

(*Notice of action under.*) A local vestry act required twenty-one days' notice of action to be brought for *any thing done in pursuance* of the act: Held, that this provision applied only to actions for torts, not to actions of contract.—*Fletcher v. Greenwell*, 4 D. P. C. 166.

WARRANT OF ATTORNEY.

1. (*Entering satisfaction on—Defeasance.*) J. executed a warrant of attorney to confess judgment; the defeasance recited a mortgage made by M. to A., with a proviso for redemption on payment of the principal on a day named, with interest in the mean time; that J. gave the warrant of attorney as a security for the payment of the interest after the rate *and at the time and in manner* appointed by the mortgage deed, and that it was intended that judgment should be entered up forthwith: and it provided, that no execution should be issued till default should be made in payment of the interest at the time, &c.; but that if default should be made in such payment, execution might be issued at any time, and from time to time thereafter, for all the arrears then due and thenceforth to accrue due. Judgment was entered up on the warrant. The interest up to the day named in the mortgage, inclusive, was paid soon after that day. A demand was afterwards made on J. for payment of interest accruing due after that day. On application to the Court to direct satisfaction to be entered on the roll; held, that the motion was at all events premature, execution not having issued; but that it was not sufficiently

clear from the defeasance, that the warrant of attorney was intended to cover only the interest up to the day named, for the Court to interfere at all.—*Atkinson v. Jones*, 2 Ad. & E. 439.

2. The defeasance to a warrant of attorney, dated 5th June, 1824, stated that it was given to secure the payment of 420*l.* (with costs of judgment, if signed,) on the 5th Dec. 1826; and that it was agreed that plaintiff should enter up judgment thereon at his pleasure, and issue execution, &c. Held, that the plaintiff was restrained by the defeasance from suing out execution before 5th Dec. 1826.—*Hiscocks v. Kemp*, 5 N. & M. 113.
3. (*Entering up judgment on.*) The Court allowed judgment to be entered up on an old warrant of attorney on the 17th of May, where the last time of suing the defendant alive was the 23d of April.—*Watts v. Bury*, 4 D. P. C. 44.
4. (*Same.*) It was held no objection to signing judgment on a warrant of attorney under 15 years old, that the defendant was insane; since no rule nisi for entering up judgment is necessary.—*Piggot v. Killick*, 4 D. P. C. 287.

WAY.

(*Evidence of title to.*) In case for obstructing the plaintiff's right of way to his close by a navigable watercourse, it appeared that the plaintiff's close, which abutted on the watercourse, had been detached about five years before the action from certain premises called the King's Head Inn. The only evidence of user was by persons frequenting the King's Head Inn in boats, before the plaintiff's close was detached. Held, no evidence to go to the jury to support the right claimed by the plaintiff.—*Bower v. Hill*, 2 Bing. N. C. 339.

And see ACTION ON THE CASE.

WITNESS.

1. (*Attachment for disobeying subpœnâ.*) An attachment for a contempt in disobeying a subpœnâ to attend as a witness, must be moved for in the term next ensuing the trial.—*R. v. Stretch*, 5 N. & M. 178; 4 D. P. C. 30.
2. (*Commission for examination of abroad.*) The Court would stay the issuing of a commission to examine witnesses abroad, on the ground that the plaintiff is indebted to the defendant for certain costs in equity.—*Oughan v. Parish*, 4 D. P. C. 29.
3. The Court has no power to compel a witness to attend to give evidence on an enquiry before the Master.—*M'Dougal v. Nicholls*, 4 D. P. C. 76.
4. (*Incompetency from interest.*) In an action against the vestry clerk of the parish of M. for work done upon the workhouse under the directions of the guardians of the poor, a person who at the time of the contract was one of the guardians, but at the time of the trial had ceased to be so, was held a competent witness. [*Parishioners* were expressly made competent by the Vestry Act of the parish.]—*Fletcher v. Greenwell*, 4 D. P. C. 166.
5. (*Subpœnâ duces tecum.*) It is not competent for a person served with a *subpœnâ duces tecum* to show that the instrument he was required to

produce was immaterial in the cause, in answer to a rule for an attachment.—*Doe d. Butt v. Kelly*, 4 D. P. C. 273.

And see BANKRUPTCY, 1.

WRIT OF ERROR.

1. (*Judgment in.*) In debt for goods sold; plea, *nil debet* except as to 1*l.* 12*s.*, and as to that a tender; the jury in a County Court having found that the defendant did not owe any thing beyond the 1*l.* 12*s.*, and as to that, certain facts on which they prayed the judgment of the Court, which was given for the defendant in the Court below, and reversed on error: Held, that on the plaintiff's releasing damages, the court of error might enter judgment for the plaintiff for 1*l.* 12*s.*, with the costs of the proceeding in the court below. (12 East, 668; 11 Rep. 56 a.)—*Finch v. Brook*, 2 Bing. N. C. 324.
2. (*Judgment of non pros. on.*) In error, where the transcript has been actually removed, the Court below has no jurisdiction to allow judgment of *non pros.* to be signed on account of the transcript not having been prepared in due time, although no laches existed on the part of the defendant in error in endeavouring to sign such judgment.—*Pitt v. Williams*, 4 D. P. C. 70.

WRIT OF RIGHT.

Seemle, that judgment as in case of a nonsuit may be obtained in a writ of right. And the excuse, that the demandant's attorney did not know until too late that the knights ought under the circumstances to have been resworn, was held insufficient.—*Mason v. Saddler*, 3 Bing. N. C. 323.

WRIT OF TRIAL ACT.

1. (*Amendment of writ.*) An order was obtained for a trial before the sheriff under the writ of trial act. The amount claimed by the bill of particulars was 16*l.* 10*s.* 8*d.*, but the writ, when produced in evidence, appeared to be indorsed for 58*l.* The Court, in granting a new trial on the ground of misdirection, after verdict for the defendant, allowed the plaintiff to amend the writ by reducing the amount indorsed to 16*l.* 10*s.* 8*d.*—*Edge v. Shaw*, 4 D. P. C. 189.
2. A motion for a new trial in a cause tried before the sheriff must be made within four days, and if the sheriff's notes cannot be obtained within that time, there must be a special affidavit of the facts.—*Muppin v. Gillatt*, 4 D. P. C. 190. *Wheeler v. Whitmore*, *ib.* 235.

EQUITY.

[Containing 2 Russ. & Mylne, Part 2; 6 Sim. Part 2; 2 Clark and Finelly, Part 2; and 8 Bligh, Part 2.]

ALIENATION.

W. L. devised his estates to trustees, in trust to pay out of the rents 300*l.*, a year for the maintenance of his son's children, and to pay the surplus rents to his son, during his life, for the maintenance of himself and his family; but so as he should not have any power to charge or alienate the same; provided that if his son should, in any manner, impede or frustrate the trusts of the will, then the surplus rents should be no longer paid to him, but should be accumulated by the trustees for the benefit of the son's children. The son having conveyed his interest under the will to trustees for his creditors: Held, that this was "impeding and frustrating" the trusts of the testator's will, and that the accumulation commenced.—*Leves v Leves*, Sim. 304.

BANKRUPT.

C. brought an action against F. in the Lord Mayor's Court, for the recovery of a debt, and issued an attachment against B., who had in his hands funds belonging to F.. W. filed a bill against C. B. F., claiming a lien on the funds, and obtained an injunction *ex parte* to restrain proceedings in the action; whilst the injunction was in force F. became bankrupt: Held, that though C. might, but for the injunction, have obtained execution before F. became bankrupt, yet that having been prevented, he was entitled only rateably with other creditors. (Stat. 6 Geo. 4, c. 16, s. 108.) —*Ullock v. Barber*, Sim. 300.

BENEFICE.

A vicar, after the 13 Eliz. c. 20, against charging benefices, was repealed by the 43 Geo. 3, c. 84, charged his living with an annuity, and covenanted, if he should exchange his living, to secure the annuity by charging and demising the new living, and that in the meantime it should be charged with the annuity. He afterwards exchanged his living, but did not execute any deed until after the revival of the 13 Eliz. by the 57 Geo. 3, c. 99, repealing the 43 Geo. 3, c. 84: Held, that the covenant was a subsisting charge on the new living, and a receiver was appointed to provide for the annuity.—*Metcalfe v. The Archbishop of York*, Sim. 224.

CHARITY.

1. (*Mortmain*.) A judgment debt due to a testator, which in his lifetime

had been reported in a creditor's suit to be an incumbrance affecting the real estate of the debtor, will not pass by his will to a charitable use, being within the Mortmain Act, 9 Geo. 2, c. 36.—*Collinson v. Pater*, R. & M. 344.

2. (*Trust*.) Where a fund is given to a corporation as trustees for the maintenance of a school, if such fund is not given out and out, the surplus, after satisfying the charge first created, belongs to the trustees.—*Attorney General v. Brazennose College*, C. & F. 295.
3. (*Lease*.) Where the trustees of a charity estate make a lease upon terms which, at the time, appear to be the best that can be procured, the lease will not be affected by a subsequent alteration of circumstances.—*Attorney General v. Hungerford*, C. & F. 257.

COPYRIGHT.

1. (*Injunction*.) In a suit for a perpetual injunction to restrain the sale of pirated copies of a print, where the answer did not suggest that the prints complained of were not pirated copies, a decree was made, though the prints which had been exhibited to the witness who proved the piracy had been stolen since the examination, and were therefore not produced at the hearing.—*Fradell v. Weller*, R. & M. 247.
2. (*Same—Costs*.) Where the plaintiff is entitled to have the injunction made perpetual, the defendant will have to pay the costs of the suit, however trivial the subject matter of the suit may be, if he did not, after the injunction was granted, tender the costs up to that time.—*S. C.*
3. (*Same*.) W. made a copy of a print invented by M., in colours, and of larger dimensions, and exhibited it as a diorama. The Court refused to restrain the exhibition, until the right had been established at law. (See *Page v. Townsend*, 5 Sim. 395.)—*Martin v. Wright*, Sim. 297.

COSTS.

1. (*Insolvent's assignee*.) In a foreclosure suit, to which the provisional assignee of the Insolvent Debtor's Court is made a party, as representing the owner of the equity of redemption, the costs of the provisional assignee will be ordered to be paid by the plaintiff, who will add them along with his own costs to the sum due on the mortgage.—*Peake v. Gibbon*, M. & K. 354.
2. (*Indemnity*.) In a suit to recover the amount of a lost bill of exchange, the loss of the bill being proved at the hearing, the defendant, if he disputes the sufficiency of an indemnity which has been offered to him, and the Master finds in favour of the indemnity, will be ordered to pay the costs subsequent to the original decree.—*Macartney v. Graham*, R. & M. 353.

And see COPYRIGHT, 1, 2; TENDER.

DECREE.

R. W. devised his real estates to trustees, in trust to dispose of the rents for the benefit of the poor of the city of R., and the limits and precincts

thereof. The trustees having applied the rents for the benefit of the poor of one only of the parishes in the city, an information was filed on behalf of two other parishes, claiming to participate in the charity, and a decree was made in 1680, directing that the rents should for ever thereafter be divided amongst the three parishes in certain proportions. In 1808 an information was filed on behalf of a fourth parish for a similar purpose; and that parish was decreed to be entitled to a share of the rents in proportion of its extent and population to the extent and population of the three other parishes; but the proportions as between those parishes were not to be altered. An information was afterwards filed on behalf of one of those three parishes, claiming an increased share of the rents on account of its population having increased more than the population of the other parishes: Held, that the Court had no power to vary the decree of 1680 after so great a lapse of time.—*Att. Gen. v. Mayor of Rochester*, Sim. 273.

DESCENT.

A. devised his real estates to trustees in trust to pay an annuity, and out of the residue of the rents to maintain S. (who was his heir) until he attained twenty-one, and on his attaining twenty-one to convey the estates to him in fee; but if he died under twenty-one, then to J. in fee. S. attained twenty-one: Held, that he took by descent.—*Wood v. Skellom*, Sim. 176.

INFANT.

A guardian was appointed to an infant entitled to freehold property worth 80*l.* a year, without a reference. (*Ex parte Wheeler*, 16 Ves. 266)—*Ex parte Jackson*, Sim. 212.

And see HUSBAND and WIFE.

INJUNCTION. See COPYRIGHT, JURISDICTION.

INSOLVENT.

A plea to a bill filed by the assignee of an insolvent debtor, that the consent of the creditors and of the Insolvent Debtor's Court to the institution of the suit had not been obtained, was over-ruled. (*Dance v. Wyatt*, 6 Bing. 486; *Doe v. Spencer*, 8 Bing. 201.)—*Casborne v. Barsham*, Sim. 217.

And see COSTS, 1.

JURISDICTION.

An injunction was granted to restrain the lords of the treasury from paying the compensation awarded under 11 Geo. 4 and 1 Will. 4, c. 58, for the office of side clerk in the exchequer, which had been abolished.—*Ellis v. Earl Grey*, Sim. 214.

HUSBAND AND WIFE.

1. (*Settlement by female infant.*) On the marriage of a female infant, who was a ward of Court, and entitled to a leasehold estate to her separate use, a settlement was made under the order of the Court, giving to the trustees a power of sale over the leasehold estate:—A sale made by the trustees and under the power, during the minority of the female infant, is not valid.—*Simpson v. Jones*, R. & M. 365.

2. (*Wife's assignment.*) The contingent reversionary interest of the wife in a trust of a term for years, may be sold by the husband; and the wife surviving will be bound by such sale, though the husband dies before the contingency is determined or the reversion falls into possession.—*Donne v. Hart*, R. & M. 360.
3. (*Same.*) A married woman, to whom a rent charge for life in reversion is devised to her separate use, without the intervention of trustees, joins with her husband in assigning it for a valuable consideration; she is bound by that assignment after the death of her husband.—*Major v. Lansley*, R. & M. 359.

LANDLORD AND TENANT:

R. T., in 1663, demised lands in Ireland together with the mines and timber, to make sale thereof, without impeachment of waste, the lessee, his executors, administrators, and assigns planting from time to time 500 trees in the room of the trees sold during the lease, for the term of ninety-eight years, at a rent of 15*l.* for the first three, and 30*l.* for the remainder of the term: and R. T. covenanted to renew from time to time and perfect such further assurances as the lessee, &c. should require. The lease also contained a covenant of warranty of title, and that in case of eviction, or the premises should be wasted in war or rebellion, the rent should cease for the time. By indenture in 1739, reciting the original lease and covenant for renewal, a further lease of ninety-eight years was granted, with a similar covenant. On a bill in 1827 to enforce a further renewal: Held, that upon the whole original lease, the covenant was to be construed as for further assurance, and not for perpetual renewal. (*Baynham v. Guy's Hospital*, 3 Ves. 295; *Moore v. Foley*, 6 Ves. 232.)—*Brown v. Tighe*, Bli. 272.

LAPSE OF TIME. See DECREE.

LEGACY.

1. (*Ademption.*) A. by his will, after reciting that he had on the marriage of two of his daughters advanced and transferred to or for the benefit of each of them 900*l.* bank stock, and had also given to each of them 500*l.* sterling, bequeathed 900*l.* bank stock and 500*l.* sterling for his remaining daughter F. during her life, for her separate use, without power of anticipation or alienation; then for her children, subject to an exclusive power of appointment by her; and if no children in whom the fund should vest, for such person as she should appoint. F. afterwards married; and on her marriage, A. advanced to her 500*l.* and transferred to the trustees of her marriage settlement 900*l.* bank stock in trust for her separate use during her life; then for her husband during his life; and after his decease for the children of the marriage; but if she died in the lifetime of her husband without leaving any child, then to her husband absolutely; and if he died in her lifetime without leaving any child by her, to her absolutely: Held, that the legacies to F. and her children were adeemed by the provision made for her on her marriage.—*Carver v. Bowles*, R. & M. 301.
2. (*Cumulative.*) A. by a will duly attested, gave legacies to various persons,

charged upon his real and personal estates, and payable at the end of two years after his death, and he directed that if his property should be more than sufficient to pay the legacies, they would be increased proportionably. By an unattested paper, purporting to be instructions for a will, but admitted to probate, A. gave legacies to many of the legatees in the will, either individually or as members of a family; but the directions as to the time of payment and the increase of the legacies were omitted: Held, that the will and testamentary paper differing materially, the legacies given by the latter were cumulative, and not substitutional for those given by the will. *Strong v. Ingram*, Sim. 197.

3. (*Lapsed.*) Where a testator directed his real and personal estate to be sold, and his debts and legacies to be thereout paid, including certain charitable legacies, and gave the residue of the mixed fund to A. and B., and the charitable legacies failed, they were held to belong to A. and B. (*Darour v. Motteux*, 1 Ves. sen. 320.)—*Green v. Jackson*, R. & M. 289.
4. (*Natural Child.*) A testatrix gave a share of her residuary estate to the children of M. deceased. M. left two children, one legitimate, the other illegitimate. Evidence was admitted to prove that the illegitimate child had acquired the reputation of being the child of M., that the testatrix well knew that fact, and that M. left only those two children. (*Bagley v. Mollard*, 1 R. & M. 581.)—*Gill v. Shelly*, R. & M. 336.
5. (*Same.*) Where a legacy is given to a natural child, with direction to apply the interest for his maintenance, the interest is payable from the death of the testator. (*Raven v. Waite*, 1 Swans. 553.)—*Dowling v. Tyrell*, R. & M. 345.
6. (*Conversion.*) Where a testatrix gave real estate upon trust to be sold, and directed the monies to arise from such sale to be considered and taken as part of her personal estate; and that out of the monies to arise from such sale, and out of all other her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and the monies arising from the sale of her real estate, upon trust for two persons and their children: and some of the pecuniary legatees died in the testatrix's lifetime: Held, that the conversion was not absolute, and that such of the legacies as had lapsed, so far as they were payable out of the produce of the real estate, went to the heir at law. (Reversing the decree of the late Master of the Rolls, 4 Russ. 75; 4 L. M. 182.)—*Amphlett v. Parke*, R. & M. 221.
7. (*Converted Stock.*) A. upon the marriage of his daughter, gave a bond for the transfer to the trustees of her settlement, during his life, or within twelve months after his decease, of 10,000*l.* four per cent. bank annuities. The only four per cent. bank annuities then existing were afterwards reduced to three-and-a-half per cents.; but there was existing at the time of his death a new four per cent. stock, which had been created two years after the reduction of the old four per cents: Held, that the bond referred to stock then in existence, and that it was satisfied by a transfer of

10,000*l.* three-and-a-half per cents.—*Sheffield v. The Earl of Coventry*, R. & M. 317.

8. (*Same.*) A. by his will gave to a son a legacy of 20,000*l.* in "the joint stock of the four per cent. bank annuities, transferable at the Bank of England, commonly called four per cent. bank annuities:" the only four per cent. bank annuities existing at the date of his will were reduced to three-and-a-half per cents.; afterwards, and before his death, a new stock of four per cent bank annuities was created: Held, that the will spoke from the testator's death, and that the son was entitled to 20,000*l.* four per cents. then existing. S. C.
9. (*How payable.*) Testator directed his trustees to sell his real and personal estate, and to apply the produce in paying his debts, and the legacies thereafter given. The testator afterwards gave legacies by codicils, one of which was duly attested: Held, that only the legacies given by the will were payable out of the real estate. (*Bonner v. Bonner*, 13 Ves. 379.) *Strong v. Ingram*, Sim. 197.

And see WILL, 1, 2.

LUNATIC.

1. The decree of the Vice Chancellor in this case, 4 Sim. 606; and 11 L. M. 502, was reversed.—*Howard v. Earl Digby*, Bli. 224.
2. Where a lunatic had two estates situate at a distance from each other, and each of considerable value, the court under the circumstances appointed a separate committee for each.—*In re Robins*, R. & M. 448.

NE EXEAT REGNO.

A writ of *ne exeat regno*, obtained by a plaintiff during a temporary visit to this country, but who afterwards returned to his usual residence abroad, was discharged. (*Hyde v. Whitfield*, 19 Ves. 342.) *Smith v. Nethersole*, R. & M. 450.

NEWSPAPER.

W. R. the proprietor of a newspaper, prevailed on S. B. a journeyman printer, to allow himself to be represented as the proprietor, and to make and deliver to the stamp office an affidavit to that effect. S. B. afterwards, with the privity of W. R. agreed to sell the paper to W. W. R. having become insolvent, his assignees filed a bill to set aside the sale for fraud: Held, that the statute 38 G. 3, c. 78, which requires the true names of the proprietors of newspapers to be inserted in the affidavit, was not merely fiscal, and that the plaintiffs could not obtain relief in a Court of justice. (*Bensley v. Bignold*, 8 Taunt. 142.) *Harmer v. Westmacott*, Sim. 284.

PARTNERSHIP.

1. (*Account.*) The Court will direct an account of past partnership transactions, though the bill does not pray a dissolution; but it will make no order for carrying on partnership concerns, unless with a view to a dissolution. (*Harrison v. Armitage*, 4 Mad. 143.)—*Richards v. Davies*, R. & M. 347.

2. (*Fraud.*) By articles of partnership it was agreed that just and true accounts should be made out half yearly and signed by the four partners, and that such accounts should not afterwards be called in question, except for errors discovered in the lifetime of all the partners. The accounts were made out by one of the partners, and, after the death of two of the other partners, it was discovered that the accounts were fraudulent: Held, that the fourth partner was entitled to a general account.—*Oldaker v. Lavender*, Sim. 239.

PLEADING.

1. (*Amendment.*) A bill was filed against two trustees, alleging that one of them only had acted in the trusts, and seeking to charge that trustee only with a breach of trust. The trustees, in their answer, admitted that they had both acted in the trusts. The plaintiffs however did not amend their bill. Held, that the plaintiffs were entitled to charge both the trustees, though it would have been more proper to amend the bill. (*Attwood v. —*, 1 Russ. 353.)—*Taylor v. Tabrum*, Sim. 281.
2. (*Interpleader.*) A bill of interpleader is not demurrable, because it does not offer to bring the money claimed into Court. But the plaintiff must bring it in before he takes any steps in the cause.—*Meur v. Bell*, Sim. 175.
3. (*Multifariousness.*) A. died intestate, leaving a widow and infant children his next of kin. The widow, without taking out administration, possessed his assets, paid his debts, and died, having bequeathed her personal estate to the children, and appointed B. and C. her executors. D. then took out administration to the intestate, and brought an action, as trustee for the children, against B. and C. for monies alleged to be due from the testatrix to the intestate's estate. B. and C. together with the children, filed a bill against D. praying for all proper accounts of the assets of the intestate and testatrix possessed by B. and C., and by D., and of what, if anything, was due from the testatrix's estate to the intestate's estate, and for an injunction to restrain the action. A demurrer for multifariousness was overruled, because relief could not be administered without taking the accounts of both estates.—*Lewis v. Edmunds*, Sim. 255.
4. (*Parties.*) E. conveyed estates to trustees, in trust to raise a fund for payment of his creditors named in a schedule, and to raise an annual sum for his own benefit. Several of the creditors executed the conveyance; but the trustees did not sell the estates, the creditors having received sums in or towards satisfaction of their debts out of other estates conveyed by E. upon the same trusts. A judgment creditor, whose name was not mentioned in the schedule, filed his bill against the trustees and E., stating that the trustees had entered into the receipt of the rents of those estates, the value of which greatly exceeded the scheduled debts, and that an account might be taken of the receipts and payments of the trustees, and for a receiver and an injunction to restrain the trustees from paying any part of the rents or produce of the estates to E. One of the trustees demurred for want of equity, and *ore tenus*, because the scheduled creditors

who had executed the conveyance were not parties to the bill. The demurrer *overtenus* was allowed; with liberty for the plaintiffs to amend their bill by adding parties.—*Cocker v. Lord Egmont*, Sim. 311.

PORCTIONS.

1. (*Double*.) A., by articles made previous to the marriage of his daughter, agreed to settle, either by deed or will, lands of the value of 3000*l.*, in trust for his daughter for life, to her separate use, remainder to the husband for life, remainder to the children of the marriage as tenants in common in tail, with cross remainders. By his will he devised a real estate worth more than 3000*l.*, in trust for his daughter for life for her separate use, but without the power of anticipation or alienation; remainder to the husband for life, he maintaining and educating the children of the marriage; remainder to the children of the marriage as tenants in common in fee; with a limitation over of the shares of those who should die under twenty-five without leaving issue, to the survivors: Held, that the two provisions were substantially of the same nature, and the difference between them not such as to repel the presumption against double portions, in the absence of extrinsic evidence.—*Weall v. Rice*, R. & M. 281.
2. (*Same*.) A., by his will, gave to his daughters and her children, 10,000*l.* four per cent. annuities, and directed that, with the exception of certain sums, of which this was not one, and which were expressly ordered to be brought into hotchpot, the legacies bequeathed to any of his children were to be, not in satisfaction of, but in addition to, any portion or provision to which they were or should be entitled under any articles or settlement then already executed by him; afterwards, upon her marriage, a sum of 10,000*l.* 4 per cent. bank annuities was settled upon S., her husband, and her children: Held, that the legacy given by the will was satisfied by the bond; the difference between the limitations of the settlement and the will not being sufficient to prevent the application of the rule as to double portions.—*Sheffield v. Earl of Coventry*, R. & M. 317.
3. (*Same—Indenture*.) Declarations of a parent, referring to his intention at the time of making his will, whether made at the time, or before, or after, are admissible evidence to prove that he did not mean to give a double provision. (*Hinchcliffe v. Hinchcliffe*, 3 Ves. 516; *Pole v. Lord Somers*, 6 Ves. 309.)—S. C.
4. (*Same—Person in loco parentis*.) A testator who has contributed to the maintenance and education of a female infant nearly related to him, from the time of her father's death, and who has been treated by her as the person whose consent was necessary to her marriage, and who has taken upon himself the obligation to make a provision for her in that event, is to be considered in *loco parentis*; and the presumption against a double provision, which would arise in the case of a father, will apply to such a case.—*Booker v. Allen*, R. & M. 270.
5. (*Same*.) A. upon the marriage of his daughter, gave a bond for 5000*l.* payable, within six months after his decease, to the trustees of his daughter's settlement; the interest to be paid to the husband for life; and after his

decease, if the wife survived, and there were children of the marriage, 1000*l.* to be paid to the wife, and the remainder to be applied for the use of the children; but if there were no children, 2000*l.* to be paid to the wife, and the remainder of the 5000*l.* to the executors and administrators of the husband; and in case the husband survived the wife, and there were no children, then the whole of the 5000*l.* to the husband. A. afterwards made his will and gave his daughter 5000*l.*, stating it to be in addition to what he had secured upon her marriage. About five years afterwards the testator covenanted by deed that his executors should pay to the trustees within six months after his death, the sum of 5000*l.* upon the trusts of the settlement. Parol evidence of the declarations of the testator was admitted to prove that he did not intend a double portion, which was accordingly declared.—*Lloyd v. Harvey*, R. & M. 310.

POWER.

1. (*Execution.*) A. having under a settlement a power of appointing by will a sum of bank stock, in respect of which three bonuses had been paid and invested since the date of the settlement, by his will, after mentioning the original amount of stock, and referring to the first bonus, as then consisting of 715*l.* five per cent. stock, though it had been converted into a larger sum of three per cent. stock, appointed the sum of bank stock and the said sum of 715*l.* five per cent bank annuities, "together with all such further additions, in the nature of profit, to be made to the said bank stock in his lifetime:" Held, that the erroneous allusion of the testator to the 715*l.* showed that he was not acquainted with the particulars of which the accumulated fund consisted, and that he intended to appoint the whole fund.—*Carver v. Bowles*, R. & M. 304.
2. (*Same.*) A. having a power under his marriage settlement to appoint a fund among his children, appointed it to his two sons and three daughters in equal shares, and then declared that the shares appointed to his daughters should be held on the same trusts for the benefit of his daughters and their issue as were therein expressed concerning the shares of his residuary estate bequeathed to each daughter and her issue: under these trusts the daughters took in their respective shares of the residue a life interest to their separate use, but without power of anticipation or alienation: Held, that the shares were well appointed to the daughters absolutely; and that it was competent for the donee of the power to limit the interests of the daughters to their separate use, and to restrain them from anticipation or alienation; and that no case of election in favour of their issue was raised against the daughters, the testator having made an absolute appointment in the first instance.—*S. C.*

PRACTICE.

1. (*Attachment.*) A defendant, who had been taken on an attachment for want of appearance, was discharged under 11 Geo. 4 and 1 W. 4, c. 36, before plaintiff got an appearance entered for her: Held, that the former attachment having been regularly enforced, a new attachment could not issue on a new subpoena; but as the defendant had not appeared, the bill

might be dismissed against her without costs, and a supplemental bill, in the nature of an original bill, filed against her.—*Williams v. Townsend*, Sim. 296.

2. (*Insufficiency.*) The time allowed by the twelfth order for procuring the report as to the insufficiency of an answer was extended, the drawing up of the order having been delayed by the offices being closed, and the plaintiff having, through inadvertency, omitted to obtain the master's certificate that further time was necessary to enable him to make his report.—*Burrell v. Nicholson*, Sim. 212.
3. (*Master's report.*) In taking accounts directed by the decree, certain payments, which had been made by A. and B. jointly, were reported by the master to have been made by B. separately. After the report had been absolutely confirmed, and B. had become bankrupt, the Court, on the petition of A., discharged the order to confirm the report, and referred it back to the master to review his report; A. paying the costs of the application and of confirming the report, and the costs of the day.—*Prentice v. Mensal*, Sim. 271.
4. (*Opening biddings.*) Biddings were opened on an advance of 300*l.* on 5,030*l.*—*Lawrence v. Halliday*, Sim. 296.
5. (*Payment of money.*) An order for payment to the husband of money to which his wife is entitled, cannot be inserted in the order on further directions, but must be obtained by petition, although the wife consents.—*Campbell v. Harding*, Sim. 283.
6. (*Process.*) Where the defendant had been taken under an attachment for want of answer, but on his paying the sheriff 40*l.* to be repaid on putting in his answer, the sheriff, at the request of the plaintiff's agent, discharged him; a motion for a messenger to take the defendant who had not put in his answer was refused, the defendant not being out on bail.—*Swindel v. Swindel*, Sim. 295.
7. (*Same.*) Where a defendant resident in Scotland has been served with a subpoena under 2 & 3 W. 4, c. 33, personal notice must be given to him of a motion for any subsequent process. (See *Prior v. Lloyd*, 5 Sim. 508.)—*Hasluck v. Stewart*, Sim. 321.
8. (*Pro confesso.*) Where a bill is ordered to be taken *pro confesso*, the decree may be made subsequently, although it is usually taken at the same time. (*Landon v. Ready*, 1 Sim. & St. 44.)—*Wollams v. Baker*, Sim. 316.
9. (*Production of documents.*) A motion by a defendant for the production of a document, admitted by the plaintiff to be in his custody, was refused with costs.—*Milligan v. Mitchell*, Sim. 186.
10. (*Same.*) To a bill for a discovery of stock standing in the name of the plaintiff's late father, either alone or jointly, for twenty years before, and at his death, and for an inspection of the Bank books, containing the entries of such stock, the Bank in their answer set forth an account of the stock, but declined to set forth a list of the books containing the entries: Held, that the Bank were not exempt from a production of these books.—*Heslop v. The Bank of England*, Sim. 192.

RECEIVER.

1. (*Balances.*) A receiver, who had been discharged, but did not pay in his balance on the day fixed by the Master, was ordered to pay in the same, and also the amount allowed for his salary, with interest, and the costs of the motion. (*Potts v. Leighton*, 15 Ves. 273.) *Harrison v. Boydell*, Sim. 211.
2. (*Liability.*) A receiver appointed by the Court is answerable for the loss of monies consequent on the failure of a banker with whom they have been deposited for security, if the deposit be made in such a way that the receiver parts with the absolute control over the fund.—*Galway v. Galway*, R. & M. 215.
3. (*Same.*) Where a receiver paid into the banking-house the sums he received, to the joint account of his sureties, under an arrangement with them that all drafts should be written by one of the sureties and signed by himself: the bankers having failed, the receiver was held liable. (Reversing the decree of the late Master of the Rolls, 4 Russ. 60; 4 L. M. 190.)—S. C.

SETTLEMENT.

By a marriage settlement, estates were limited to the wife and the husband for their lives, with remainder to the heirs of the body of the husband on the body of the wife, and their heirs, and, if more children than one, equally to be divided among them as tenants in common; and for default of such issue, to the wife and her heirs: Held, that the words, "if more children than one," must be taken to be interpretative of the words "heirs of the body;" and that the children of the marriage took by purchase in fee as tenants in common. (See *Preston on Estates*, 259.)—*North v. Martin*, Sim. 266.

SHIP.

By the stat. 53 Geo. 3, c. 159, the responsibility of ship-owners for damage done by their ships to other vessels is limited to the value, at the time of the accident, of the ship doing the damage, and the costs of the action at law. (*Wilson v. Dickson*, 2 Barn. & Ald. 2.)—*Dobree v. Schroder*, Sim. 291.

TRUSTEES.

Trustees who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, an offer of 6,600*l.* for the estate, but they afterwards sold it for 3,600*l.* The Court charged them with the loss, but gave them their costs, as their conduct had not been wilful or perverse. (See *Tebbs v. Carpenter*, 1 Madd. 290.)—*Taylor v. Tabrum*, Sim. 281.

VENDOR AND PURCHASER.

J. S., by his will in his own hand-writing, devised an estate to Ann Aspinall and her heirs, if she should be then living; but if not, then to her issue and their heirs. He afterwards made a codicil commencing thus: "This is a codicil to the last will and testament of me, J. S., and which will I sometime since made in my own hand-writing, and thereby devised to
VOL. XV.

John Aspinall as therein mentioned." At the date of the codicil Ann Aspinall had a son named John. Part of the testator's estates having been sold in pursuance of a direction in the will, the purchaser objected to the title on the ground that the reference in the codicil afforded strong presumption of the existence of a subsequent will. But as the will produced contained a gift which might take effect in favour of John Aspinall, the objection was overruled.—*Howarth v. Smith*, Sim. 161.

WILL.

1. (*Construction—Dying without issue.*) A. after bequeathing divers annuities and legacies, and, amongst others, a sum of stock to M. to vest at twenty-one, or marriage, devised and bequeathed a plantation, and all the residue of her money in the funds, after payment of the annuities and legacies thereinbefore bequeathed, and also her plate, books, and certain portraits, to E. and T. for their lives equally, and after the death of either, the whole to the survivor for life, and after the decease of the survivor, then unto such children of T. as she should by deed or will appoint; and in default of appointment, then the plantation and the residue of the money in the funds to be equally divided among the said children and their heirs; and if but one child, the whole to such child and his or her heirs, the funded property to be an interest vested in them, being sons, at twenty-one, and being daughters, at twenty-one or marriage; but in case T. should die without issue of her body lawfully begotten, A. devised the plantation equally among all the children of W. and their heirs; and in case T. should die without issue as aforesaid, A. then bequeathed her said residue of her money in the funds and all her said plate, books, and portraits, unto J. for life, and after his decease to his eldest son for ever: but in case J. should die under age, and without issue, the said residue of her money in the funds, plate, books, and portraits unto M. M. absolutely. All the rest and residue of her estate and effects, the testatrix gave and bequeathed unto E. and T. absolutely. T. having survived E., and died without having been married, it was held, that J., upon the death of T., became entitled for life to the money in the funds; that J. took no interest in the plate, books, and portraits; and that the stock bequeathed to M. M., which had lapsed by her death under age and unmarried, passed under the residuary bequest of the funded property for the benefit of J., and did not sink into the general residue.—*Malcolm v. Taylor*, R. & M. 416.
2. (*Same.*) A gift over of money upon the death of a legatee without issue is void, unless from the words of the will it can be collected that the testator meant a death without issue at the time of the death of the legatee.—*Lepine v. Ferard*, R. & M. 378.
3. (*Construction.*) A testatrix directed the interest of her residuary estate to be applied in defraying the expenses of the education of her nephews G. and C., and the principal to be applied either in binding them apprentices at the age of fourteen, or to be reserved till they attained twenty-one, to commence business. And "in the event of G. and C. (both or

either of them,) being settled before this will comes in force, I provide that the next boy, J. or H. have the benefit, and so on." G. and C. survived the testatrix, but died under twenty-one: Held, that J. and H. were entitled to the residue. (*Jones v. Westcomb*, 1 Eq. Ab. 245.) *Prestwidge v. Groombridge*, Sim. 171.

4. (*Same.*) A testator, after directing all his debts to be fully paid, devised his real estates to several persons, and charged certain of them with specific sums: Held, that all the estates were charged with the debts. (*Bradford v. Foley*, 3 Bro. C. C. 351.) *Taylor v. Taylor*, Sim. 246.
5. (*Same.*) M. V. gave a sum of stock to his wife for life, and, after her death, to his son and daughter; the interest of the daughter's share to be paid to her for her separate use for life, and at her decease her share to be divided amongst such children as she should have living at M. V.'s decease, or born in due time after; the shares of sons to be paid at twenty-one, and of daughters at twenty-one, or marriage, provided their mother was then dead, otherwise her children's shares were not to be paid to them until her decease, with a provision for maintenance if the daughter should die before her children attained twenty-one, or (if daughters) marry; but if the testator's daughter had no children living at her decease, her share was to be equally divided amongst such of his sons as should be then living; and if any of his said sons and daughter should die before his wife, and without leaving issue, their shares were to be divided among his other children: Held, that the daughter's children living at the testator's death took absolute vested interests at twenty-one; but that the daughter's interest in the share of one of her brothers, who died in the lifetime of the mother, was not subject to the trusts of her original share, but vested in her absolutely.—*Gibbons v. Langdon*, Sim. 260.
6. (*Same—Power.*) P. gave a weekly sum to A. for his life, or until he should attempt to assign, charge, or incur the same, and she directed a sum of stock to be set apart to answer the payments; and she gave to A. the power of leaving the stock, after the payments to him should cease, either for the causes above mentioned, or by his death, to and for the benefit of his wife and children, as he should by will duly executed give and bequeath the same. A. died, having made an invalid appointment: Held, that P. intended the wife and children to take the fund, and, therefore, that there was a gift to them by implication, subject to the power.—*Brown v. Pocock*, Sim. 257.
7. (*Same.*) Where A. bequeathed 6000*l.* in trust for his daughter for life, and on her decease, to the children, or their descendants, of B. in such proportions to each as his daughter might direct, and the daughter died without having made any appointment: Held, that the children of B. were entitled to the exclusion of their issue. (*Montagu v. Nucella*, 1 Russ. 165.) *Jones v. Torin*, Sim. 255.
8. (*Same.*) J. L. devised estates to trustees upon trust to convey them

to the use of his eldest son, J. H. L., for life, with remainder to trustees to preserve; with remainder to the use of the second, third, fourth, fifth, and all and every other the sons and son of the body of J. H. L., severally, successively, and in seniority of age in tail male: with remainder to the use of J. H. L.'s first, second, third, fourth, fifth, and all and every other daughters and daughter successively, in tail general; remainder to the use of the deviser's eldest daughter, M. S. L., for life; remainder to trustees to preserve; remainder to the use of the first, second, third, fourth, fifth, and all and every other son of M. S. L. successively in tail male; remainder to her first, second, and other daughters successively in tail general; with divers other like remainders to the deviser's other daughters and their issue, and various intermediate terms in trust: Held, that taking the whole will together, it was clear the omission of the first son of J. H. L. in the limitation after the life estate to J. H. L., was a mistake; and that the words "all and every other the sons and son of the body of J. H. L.," were in themselves sufficient to include the first son; and that such first son was entitled to have an estate tail, expectant on the death of his father, limited to him in the conveyance directed to be made by the trustees.—*Langston v. Langston*, C. & F. 194, Bli. 167.

9. (*Same*—*Remoteness*.) A. by his will gave to C., described as his natural daughter, a sum of stock, and his house and land at C.: with a direction that if she married, the property should be settled solely upon herself and children, but in case of her death without lawful issue, the money so left to her to be divided betwixt his nephews and nieces who might be living at the time, and the land at C. to his nephew J. H.: Held, that C. took the stock absolutely.—*Campbell v. Harding*, R. & M. 390.
10. (*Same*.) A. gave to his brother 300*l.* per annum during his life and to each of two nephews 150*l.* during their lives; but if either of the nephews died, the other to inherit the whole 300*l.*; and if the brother died with issue, the two nephews to inherit from the brother: and he then proceeded to state that the reason why he left only the interest to his brother and two nephews was, that, if they died without issue, the money might go to his three cousins, to be divided equally between them: the brother and nephews all died without issue: Held, that this was a limitation over to the cousins on a general failure of issue, and therefore void for remoteness.—*Lepine v. Ferard*, R. & M. 378.
11. (*Residuary bequest*.) A bequest of "all my household furniture, implements of trade, cattle, sheep, and all the rest and residue of my monies, securities for money and personal estate whatsoever and where-soever, not hereinbefore disposed of," is a residuary and not specific bequest.—*Taylor v. Taylor*, Sim. 246.

And see DESCENT, PORTIONS, LEGACY.

BANKRUPTCY.

[Containing 2 M. & Ayr. Part 2, except such cases as have appeared in former Digests.]

ASSIGNEES.

1. Where the assignees had made an arrangement concerning the payment of the creditor's debts, a reference was ordered to the commissioners to enquire whether it would be beneficial to the estate.—*Exp. Hyslop*, 289.
2. S. remitted to B., as the agent for Maberly, a banker, 450*l.* in order to retire a note of S., but which was not done, as Maberly became bankrupt. B. having a claim against Maberly, the assignees of Maberly allowed him to retain 2000*l.* including, as was assumed, the 450*l.* : Held, that the assignees were bound to refund to S. the 450*l.*—*Exp. Simpson*, 294.
3. The commissioners cannot charge both assignees with twenty per cent. where only one had the money, unless he finds that the other "knowingly permitted it."—*Exp. Benham*, 272.

COMMISSIONERS.

1. Where the commissioners were absent from the first meeting, the Court appointed another first meeting.—*Exp. Hall*, 294.
2. The quorum commissioners named in a fiat are entitled to be summoned, and if not summoned, the Court of Review will interfere.—*Exp. Douglas*, 218.

COSTS.

In cases of scandal, the costs are as between solicitor and client. (*Exp. Simpson*, 15 Ves. 476.)—*Exp. Porter*, 220.

EQUITABLE MORTGAGE.

1. A., who held goods of the bankrupt as a security for a debt to him, with interest, at the request of the assignees, delayed the sale for a better market, and afterwards sold; he was held to be entitled to apply the proceeds in reduction of the interest accrued due since the fiat, he not being obliged to come to the Court for assistance.—*Exp. Kensington*, 300.
2. An equitable mortgage was declared well created by the deposit of one title-deed, a conveyance to trustees in trust for the bankrupts, where the other deeds were in the hands of their solicitors, but with no intent to give an equitable mortgage.—*Exp. Chippendale*, 299.

FIAT.

1. (*Fees.*) When a country fiat is superseded because the commissioners decline to act, and a new one issues to a London commissioner, this is not a "removed" fiat under 1 & 2 W. 4, c. 56, s. 45 & 46, and full fees must be paid.—*In the matter of Willman*, 292.
2. (*Renewal.*) A new fiat was ordered to issue on the petition of the same petitioning creditor before the time for opening had expired, he having been unable to prove an act of bankruptcy before, but one having been since committed: order without prejudice to the bankrupt's rights, and the petitioner undertaking to prosecute.—*Exp. Llewellyn*, 298.
3. (*Impounded.*) If a fiat is impounded on the application of A., a petition for its delivery out, presented by B., must be served on A.—*Exp. Martin*, 293.

INSOLVENT.

Where a trader takes the benefit of the Insolvent Debtors' Act, a creditor whose debt is inserted in the schedule may afterwards issue a fiat on that debt against the trader.—*Exp. Barrington*, 255.

INTEREST.

Where a dividend had been declared twenty-eight years, and the amount invested, the creditor was held entitled to the accumulated interest.—*Exp. Halford*, 189.

MORTGAGE.

If a legal mortgage is ordered to be sold by the commissioners, the assignees are entitled to the rents to the time of sale, unless the mortgagee makes an actual entry, or gives notice to the tenants to pay the rents to him.—*Exp. Living*, 223.

PARTNERSHIP.

If there be three partners in a particular transaction, in which one furnishes the goods and the other two accept bills for the price, and it be agreed that the bills are to be paid out of the return proceeds of the goods, and the two acceptors become bankrupt, the indorsees of the bills, with notice of the agreement, are entitled to the benefit of it, after the joint creditors, if any, of the three are paid.—*Exp. Copeland*, 167.

PRACTICE.

1. (*Annuling fiat.*) On a petition to annul a fiat, on consent, under 6 G. 4. c. 16, ss. 133, 134, the assignees must be served.—*Exp. Race*, 342.
2. (*Four day order.*) When all is regular, the four day order to pay or stand committed, is of course at the office.—*Exp. Smith*, 213.

PROOF.

1. (*Life interest.*) R. gave a sum of money in trust for his married daughter for life, then to her husband for life, and then for the children. The husband owed R. money on bond, and R. directed that if not paid off in his lifetime, it should be taken in satisfaction of the trust money. A payment was made on the bond, and invested in stock; the husband became bankrupt, and the executor proved the remaining bond debt, and invested the

dividends in stock; the wife died: Held, that the interest was to accumulate until the trust money was made good, and then the husband's assignees were to be entitled to the interest during his life.—*Exp. Younge* 228.

2. (*Bill of exchange.*) When bills of third persons are indorsed to and deposited by the bankrupt with a creditor as a collateral security for a debt, and they are afterwards paid by such third persons, their value must be deducted from the proof, and dividends paid only on the residue.—*Exp. Brunskill*. 220.
3. (*Felony.*) An actuary embezzled various sums, rendering forty indictments necessary, and became bankrupt. Five indictments were preferred, which failed from technical reasons, which would apply to any other indictment. Proof was allowed for the whole sum embezzled, enough having been done to satisfy public justice.—*Exp. Jones*, 193.
4. (*Surety.*) A. and B. gave a joint and several promissory note for the debt of C. B. becomes bankrupt, and then A. paid the amount: Held, that A. could not prove against B. as a surety, under sect. 52 of the 6 G. 4, c. 16.—*Exp. Porter*, 281.

REPUTED OWNERSHIP.

1. The owner of shares in an insurance company assigned them by way of mortgage, giving notice to the company, but owing to an informality in the assignment, the company did not recognize the mortgagor's title, and the shares remained in the bankrupt's name: Held, that the shares were not in the reputed ownership of the bankrupt.—*Exp. Masterman*, 209.
2. Shares in an insurance company stand in the name of a bankrupt, who is on all occasions the only apparent owner, and has possession of the certificates of the shares, but the shares belong to another person, in whose favour there exists a secret declaration of trust; the shares are in the reputed ownership of the bankrupt. Reversing the decision of the C. R., (1 M. & A. 689, and 13 L. M. 251.)—*Exp. Watkins*, 348.
3. The private knowledge of one of the directors and the actuary, that the shares did not belong to the bankrupt, is not sufficient to prevent reputed ownership.—S. C.

SOLICITOR.

Where the assignment from the provisional assignees to the assignees was prepared, but, through neglect of the solicitor, never executed, the provisional assignment was ordered to be vacated, and a new assignment executed by the commissioners, he paying the costs of vacating the provisional assignment and of preparing and executing the new assignment and of the petition.—*Exp. Bennett*, 306.

SUPERSEDEAS.

The commissioner appointed two meetings under 1 & 2 Will. 4, c. 56, s. 20, at the first of which assignees were chosen: Held, that the fiat could not be annulled with consent of the creditors under 6 Geo. 4, c. 16, s. 113,

- 134, till after the second meeting, as other creditors might then come in and prove.—*Exp. Boardman*, 209.

TRUSTEE.

1. Where a trustee becomes bankrupt, the general rule is 'hat the Court will not appoint a new trustee under 6 Geo. 4, c. 16, s. 79, without a reference, unless all parties are before the Court. Otherwise where the sum is extremely small.—*Exp. Wish*, 114.
 2. If a trustee become bankrupt, the Court will appoint a new trustee, without a reference, if there be an affidavit of solvency and fitness.—*Exp. Walton*, 242.
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LIST OF CASES.

COMMON LAW.

Adx v. Stubbs, 4 D. P. C. 282	Practice, 28
Allies v. Probyn, 4 D. P. C. 153	Pleading, 7
Allenby v. Proudlock, 4 D. P. C. 54	Arbitration, 10
Angle, Exp., 2 Bing. N. C. 18	Fleet Prison
Anonymous, 5 N. & M. 12	Overseer, 1
Arbuckle v. Price, 4 D. P. C. 174	Arbitration, 18
Arden v. Jones, 4 D. P. C. 120	Process, 9
Atkinson v. Brindall, 2 Bing. N. C. 225	Bankruptcy, 3
———— v. Duckham, 4 D. P. C. 327	Pleading, 15
———— v. Jones, 2 Ad. & E. 439	Warrant of Attorney, 1
Attorney General v. Dyer, 2 C. & M. 664	Excise Acts
———— v. Schiers, 2 C., M. & R. 286	Smuggling, 3
———— v. Tomsett, 2 C., M. & R. 170	Smuggling, 2
Bailey v. Stevens, 4 D. P. C. 255	Arbitration, 14
Baisley v. Newbold, 2 C., M. & R. 325; 4 D. P. C. 177	Practice, 3
Ball v. Stafford, 2 Bing. N. C. ; 4 D. P. C. 327	Bail, 8
Barber, In re, 2 Bing. N. C. 268	Notarial Certificate
Bastard v. Trutch, 5 N. & M. 109; S. C. 4 D. P. C. 6, nomine Boston v. Trutch	Sheriff, 1
Bate v. Botten, 2 C., M. & R. 365; 4 D. P. C. 160	Practice, 8
Batten v. Squires, 4 D. P. C. 53	Certiorari, 2
Beames v. Cross, 4 D. P. C. 122	Interpleader Act, 4
Beare v. Pinkus, 4 N. & M. 846	Costs, 3
Bell v. Harrison, 4 D. P. C. 181	Venue
Bird v. Cooper, 4 D. P. C. 148	Arbitration, 12
—— v. Relph, 4 N. & M. 878	Benefice
Blake v. Beaumont, 4 D. P. C. 219	Trespass, 2
Boodle v. Davies, 4 N. & M. 788	Arbitration, 3
Bottomley v. Belchamber, 4 D. P. C. 26	Affidavit, 3; Costs, 7
Boucher v. Sims, 4 D. P. C. 173	Prisoner, 6
Boughey v. Webb, 4 D. P. C. 320	Prisoner, 9
Bower v. Hill, 2 Bing. N. C. 339	Way
Boyce v. Chapman, 2 Bing. N. C. 222	Carrier
Brown v. Austin, 4 D. P. C. 161	Pleading, 8
Bruyeres v. Halcomb, 5 N. & M. 149	Election Petition
Bunting, In re, 2 Ad. & E. 467	Attorney, 2
Cannel v. Curtis, 2 Bing. N. C. 228	Overseer, 2
Carson v. Dowding, 4 D. P. C. 297	Process, 16
Cawthorne v. Cawthorne, 4 D. P. C. 182	Costs, 11

Chitty v. Dendy, 4 N. & M. 842	.. .. .	Pleading, 2
Clarke, In re, 4 N. & M. 709	.. .. .	Attorney, 3
— v. Gilbert, 2 Bing. N. C. 42	.. .. .	Bankruptcy, 5
Cock v. Coxwell, 2 C., M. & R. 291; 4 D. P. C. 187	.. .. .	Bill of Exchange, 4
Collins v. Gwynne, 4 D. P. C. 122	.. .. .	Costs, 10
Cooper v. Wheale, 4 D. P. C. 281	.. .. .	Process, 15
Copeland v. Nevill, 5 N. & M. 172; 4 D. P. C. 51	.. .. .	Process, 1, 7
Cox v. Peacock, 4 D. P. C. 134	.. .. .	Executor and Administrator, 4
Cotton v. Brown, 4 N. & M. 831	.. .. .	Pleading, 1
Croft, Exp. 5 N. & M. 58	.. .. .	Attorney, 5
Cromer v. Brown, 4 D. P. C. 288	.. .. .	Practice, 29
Cross, Exp. 4 D. P. C. 18	.. .. .	Attorney, 8
— v. Wilkins, 4 D. P. C. 179	.. .. .	Process, 14
Davidson v. Danne, 4 D. P. C. 119	.. .. .	Process, 8
Deemer v. Brooker, 4 D. P. C. 9	.. .. .	Prisoner, 4
Dennehey v. Richardsop, 4 D. P. C. 13	.. .. .	Practice, 12
Doe d. Bartley v. Gray, 4 N. & M. 719	.. .. .	Stamp
— Bishton v. Hughes, 2 C., M. & R. 281	.. .. .	Ejectment, 2
— Butt v. Kelly, 4 D. P. C. 273	.. .. .	Witness, 5
— Douglas v. Lock, 4 N. & M. 807	.. .. .	Lease
— Greaves v. Roe, 4 D. P. C. 88	.. .. .	Ejectment, 6
— Guines v. Roe, 4 D. P. C. 87	.. .. .	Ejectment, 5
— Johnson v. Baytrup, 4 N. & M. 837	.. .. .	Ejectment, 1
— Lumley v. Scarborough, 4 N. & M. 724	.. .. .	Devise, 1
— Milburn v. Edgar, 2 Bing. N. C. 391	.. .. .	Lords' Act, 1
— Overseers of Llandesilio v. Roe, 4 D. P. C. 222	.. .. .	Pleading, 11
— Palmer v. Roe, 4 D. P. C. 95	.. .. .	Attorney, 10
— Rigby v. Roe, 4 D. P. C. 14	.. .. .	Ejectment, 4
— Shelton v. Shelton, 4 N. & M. 857	.. .. .	Copyhold; Estoppel
— Smith v. Roe, 4 D. P. C. 265	.. .. .	Ejectment, 9
— Thomson v. Roe, 4 D. P. C. 115	.. .. .	Ejectment, 7
— Treat v. Roe, 4 D. P. C. 278	.. .. .	Ejectment, 10
— Wilson v. Roe, 4 D. P. C. 124	.. .. .	Ejectment, 6
— v. Huddart, 2 C., M. & R. 316	.. .. .	Ejectment, 3
— v. Roe, 4 D. P. C. 173	.. .. .	Ejectment, 8
Donlan v. Brett, 2 Ad. & E. 4; 4 N. & M. 854	.. .. .	Arbitration, 4
Drake v. Brown, 2 C., M. & R. 270	.. .. .	Judge's Order
— v. Harding, 4 D. P. C. 34	.. .. .	Affidavit to hold to Bail, 1
Eardley v. Steer, 2 C., M. & R. 327	.. .. .	Arbitration, 7
Edge v. Shaw, 4 D. P. C. 189	.. .. .	Writ of Trial Act, 2
Edgington v. Nixon, 2 Bing. N. C. 316	.. .. .	Practice, 10
Edwards v. Barnes, 2 Bing. N. C. 252	.. .. .	Devise, 3
Engler v. Twisden, 2 Bing. N. C. 263	.. .. .	Executor and Administrator, 6
Evans, In re, 2 C., M. & R. 206	.. .. .	Legacy Duty, 2
Farley v. Bryant, 5 N. & M. 42, 58	.. .. .	Costs, 2; Debt
Fallows v. Bird, 4 D. P. C. 183	.. .. .	Pleading, 9
Fidlett v. Bolton, 4 D. P. C. 282	.. .. .	Practice, 27

Fielder v. Crow, 4 D. P. C. 50	.. .. .	Practice, 14
Finch v. Brook, 2 Bing. N. C. 324	.. .. .	Writ of Error, 1
Fletcher v. Greenwell, 4 D. P. C. 166	.. .. .	Vestry Act; Witness, 4
Flight v. Glossop, 4 D. P. C. 135	.. .. .	Practice 19
Foster v. Ley, 2 Bing. N. C. 269	.. .. .	Legacy Duty, 1
Fownes v. Stokes, 4 D. P. C. 125.	.. .. .	Arrest, 3
Frankum v. Lord Falmouth, 4 D. P. C. 65	.. .. .	Costs 8
Frodsham v. Myers, 4 D. P. C. 280	.. .. .	Costs, 14
—— v. Rust, 4 D. P. C. 90	.. .. .	Practice, 15

Gallini v. Doe d. Gallini, 4 N. & M. 894	.. .. .	Devise, 2
Garritt v. Sharpe, 4 N. & M. 834	.. .. .	Ancient Lights
George v. Fry, 4 D. P. C. 273	.. .. .	Prisoner, 7
Gilmore v. Hague, 4 D. P. C. 303	.. .. .	Bill of Exchange, 7
Glen v. Wilks, 4 D. P. C. 322	.. .. .	Process, 18
Glover, Exp. 4 D. P. C. 291	.. .. .	Bastard
Godson v. Lloyd, 4 D. P. C. 157	.. .. .	Court of Requests Act
Goodall v. Ray, 4 D. P. C. 1, 76	.. .. .	Arbitration, 1; Promissory Note, 4
Gooday v. Clark, 2 C., M. & R. 272	.. .. .	Excise Officer
Gould v. Williams, 4 D. P. C. 91	.. .. .	Insolvent
Graham v. Pitman, 4 N. & M. 37	.. .. .	Bill of Exchange, 1
Grant v. Kemp, 2 C., M. & R. 636	.. .. .	Executor and Administrator, 3
—— v. Fry, 4 D. P. C. 135	.. .. .	Interpleader Act, 5
Griffiths v. Jones, 2 C., M. & R. 333; 4 D. P. C. 159	.. .. .	Costs, 5

Hannington v. Beare, 4 D. P. C. 256	.. .. .	Bail, 4
Hanson v. Shackleton, 4 D. P. C. 48	.. .. .	Process, 6
Hardbottle v. Clark, 4 D. P. C. 12	.. .. .	Bail, 2
Harris v. Griffith, 4 D. P. C. 289	.. .. .	Affidavit, 4
Harrison v. Almond, 4 D. P. C. 321	.. .. .	Husband and Wife; Bail, 4
—— v. Douglas, 5 N. & M. 180	.. .. .	Insurance, 3
—— v. Turner, 4 D. P. C. 72	.. .. .	Affidavit to hold to Bail, 2
—— v. Ward, 4 D. P. C. 38	.. .. .	Attorney, 11
Hart v. Minors, 2 C. & M. 700	.. .. .	Executor and Administrator, 3
—— v. Nash, 2 C., M. & R. 337	.. .. .	Limitations, Statute of, 2
—— v. Weatherley, 4 D. P. C. 171	.. .. .	Process, 10
Hickman v. Dallimore, 4 D. P. C. 278	.. .. .	Process, 13
Hill v. Harvey, 2 C., M. & R. 307; 4 D. P. C. 163	.. .. .	Process, 2
Hinchliffe v. Jones, 4 D. P. C. 86	.. .. .	Practice, 17
Hinton v. Stevens, 4 D. P. C. 283	.. .. .	Process, 19
Hiscocks v. Kemp, 5 N. & M. 113	.. .. .	Judgment; Warrant of Attorney, 2
Hoffman v. Marshall, 2 Bing. N. C. 383	.. .. .	Insurance, 2
Holmes v. Mentze, 4 D. P. C. 300	.. .. .	Interpleader Act, 7
Housley v. Boyd, 1 Scott, 698, 699	.. .. .	Bail, 6, 10
How v. Kennett, 5 N. & M. 1	.. .. .	Landlord and Tenant
Howard v. Groom, 4 D. P. C. 21	.. .. .	Attorney, 10
Hughes v. Williams, 2 C., M. & R. 331; 4 D. P. C. 169	.. .. .	Pleading, 5
Hulme, Exp. 4 D. P. C. 89	.. .. .	Attorney, 14
Hunt's Bail, 4 D. P. C. 72	.. .. .	Bail, 6

<i>Jones v. Levy</i> , 4 D. P. C. 116	.. .. .	Arrest, 3
<i>Jackson v. Adams</i> , 2 Bing. N. C. 402	.. .. .	Slander, 2
<i>Johnson v. Walls</i> , 4 D. P. C. 315	.. .. .	Bail, 7
——— <i>v. Holdsworth</i> , 4 D. P. C. 63	.. .. .	Practice, 16
<i>Jones v. Fowler</i> , 4 D. P. C. 32	.. .. .	Practice, 25
<i>Kerry v. Reynolds</i> , 2 C., M. & R. 310; 4 D. P. C. 234	.. .. .	Practice, 4
<i>Kirby v. Snowden</i> , 4 D. P. C. 191	.. .. .	Practice, 20
<i>King v. Taylor</i> , 2 C., M. & R. 235	.. .. .	Assumpsit, 2
<i>Kitchener v. Power</i> , 4 N. & M. 710	.. .. .	Bankruptcy, 1
<i>Kloss v. Dodd</i> , 4 D. P. C. 67	.. .. .	Scire Facias
<i>Knight's bail</i> , 4 D. P. C. 328	.. .. .	Bail, 9
<i>Larkin v. Massie</i> , 4 D. P. C. 239	.. .. .	Executor and Administrator, 7
<i>Leigh v. Bender</i> , 4 D. P. C. 201	.. .. .	Practice, 21
<i>Lindsell v. Bonnor</i> , 2 Bing. N. C. 241	.. .. .	Limitations, Statute of, 1
<i>Lowe, Exp.</i> 4 D. P. C. 15	.. .. .	Churchwarden
<i>M'Auliffe v. Bicknell</i> , 2 C. M. & R. 265	.. .. .	Shipping
<i>McDonald v. Rooke</i> , 2 Bing. N. C. 217	.. .. .	Malicious Prosecution
<i>McDougall v. Nicholls</i> , 4 D. P. C. 76	.. .. .	Witness, 3
<i>Mack v. Rust</i> , 4 D. P. C. 206	.. .. .	Pleading, 10
<i>Mackay</i> , In the matter of, 2 Ad. & E. 356	.. .. .	Arbitration, 1
<i>McKenzie v. Johnson</i> , 1 Scott, 594	.. .. .	Arrest, 1
<i>Mann v. Lang</i> , 5 N. & M. 202	.. .. .	Executor and Administrator, 9
<i>Martin v. Martin</i> , 2 Bing. N. C. 240	.. .. .	Practice, 9
<i>Masters</i> , In re, 4 D. P. C. 18	.. .. .	Attorney, 9
<i>Mason v. Saddler</i> , 2 Bing. N. C. 323	.. .. .	Writ of Right
<i>Maxwell, Exp.</i> 4 D. P. C. 87	.. .. .	Attorney, 13
<i>Mead v. Davidson</i> , 4 N. & M. 701	.. .. .	Insurance, 1
<i>Moon v. Raphael</i> , 2 Bing. N. C. 310	.. .. .	Trover, 2
<i>Moore v. Clay</i> , 4 D. P. C. 5	.. .. .	Prisoner, 3
——— <i>v. Archer</i> , 4 D. P. C. 214	.. .. .	Process, 12
<i>Morgan, Exp.</i> 4 D. P. C. 296	.. .. .	Attorney, 17
——— <i>v. Ruddock</i> , 4 D. P. C. 313	.. .. .	Apothecary
<i>Morris v. Smith</i> , 2 C., M. & R. 314; 4 D. P. C. 98	.. .. .	Practice, 5
——— <i>v. Davies</i> , 4 D. P. C. 316	.. .. .	Process, 17
<i>Mosley, Exp.</i> 4 D. P. C. 69	.. .. .	Attorney, 12
<i>Muppin v. Gillatt</i> , 4 D. P. C. 190	.. .. .	Writ of Trial Act, 2
<i>Munk v. Clark</i> , 2 Bing. N. C. 299	.. .. .	Bankruptcy, 4
<i>Neck v. Humphrey</i> , 4 N. & M. 707	.. .. .	Escape
<i>Newton's bail</i> , 4 D. P. C. 270	.. .. .	Bail, 5
——— <i>v. Matthews</i> , 4 D. P. C. 237	.. .. .	Practice, 24
<i>Nicholas v. Hayter</i> , 2 Ad. & E. 348, 354; 4 N. & M. 882.	Attorney, 1; Costs, 1	
<i>Oughgan v. Parish</i> , 4 D. P. C. 29	.. .. .	Witness, 2
<i>Page v. Hemp</i> , 4 D. P. C. 303	.. .. .	Process, 11
<i>Paine v. Emery</i> , 2 C., M. & R. 304; 4 D. P. C. 191	.. .. .	Oyer

Parry v. Fairhurst, 2 C., M. & R. 190	..	:	..	..	Amendment
Paul v. Goodluck, 2 Bing. N. C. 220	..	..	..	..	Replevin
Pearce v. Vincent, 2 Bing. N. C. 328	..	..	..	..	Devise, 4
Pellocat v. Angell, 2 C., M. & R. 311	..	..	..	..	Illegal Contract
Penn v. Ward, 2 C., M. & R. 238 ; 4 D. P. C. 215	..	..	..	..	Trespass, 1
Percival v. Frampton, 2 C., M. & R. 180	..	..	..	..	Bill of Exchange, 5
Pierce v. Evans, 2 C., M. & R. 294	..	..	..	..	Transfer of Debts
Piggot v. Killock, 4 D. P. C. 287	..	..	..	..	Warrant of Attorney, 4
Pitt v. Williams, 4 D. P. C. 70	..	..	..	..	Writ of Error, 2
Plimley v. Westley, 2 Bing. N. C. 249	..	..	..	..	Promissory Note, 3
Prince v. Samo, 4 D. P. C. 5	..	..	..	..	Costs, 6
Poole v. Watkins, 4 D. P. C. 11	..	..	..	..	Attorney, 7
Pounds v. Penfold, 5 N. & M. 186	..	..	..	..	Practice, 1
Poweler v. Lock, 4 N. & M. 852	..	..	..	..	Interpleader Act, 1
Reeves v. Ward, 2 Bing. N. C. 235	..	..	..	..	Executor and Administrator, 5
Rex v. Archdeacon of Lichfield and Coventry, 5 N. & M. 42	..	..	..	..	Churchwarden
— v. Goodenough, 2 Ad. & E. 463	..	..	..	..	Highway, 1
— v. Inhabitants of St. George's, Exeter, 5 N. & M. 61	..	..	..	..	Settlement
— v. Jeyes, 5 N. & M. 101	..	..	..	..	Costs, 4
— v. Justices of Middlesex, 5 N. & M. 126	..	..	..	..	Metropolis Paying Rates
— v. ——— Nottingham, 5 N. & M. 160	..	..	..	..	County Rate
— v. ——— Stafford, 5 N. & M. 94	..	..	..	..	Justices, 2
— v. ——— Suffolk (Ex parte Bowes), 5 N. & M. 139	..	..	..	..	Sessions
— v. Monmouthshire Canal Company, 5 N. & M. 68	..	..	..	..	Canal Act
— v. Pereira, 2 Ad. & E. 375	..	..	..	..	Smuggling, 1
— v. Pilgrim, 4 D. P. C. 89	..	..	..	..	Prisoner
— v. Roberts, 5 N. & M. 130	..	..	..	..	Office
— v. Robinson, 2 C., M. & R. 334	..	..	..	..	Sheriff, 2
— v. Sheriff of Devon, 2 Ad. & E. 296	..	..	..	..	Judge
— v. Simons, 4 D. P. C. 294	..	..	..	..	Overseer, 3
— v. Siviter, 5 N. & M. 125	..	..	..	..	Highway, 2
— v. Stretch, 5 N. & M. 178 ; 4 D. P. C. 30	..	..	..	..	Witness, 1
— v. Trecothick, 2 Ad. & E. 405	..	..	..	..	Justices, 1
— v. Wattnaby, 2 Ad. & E. 435	..	..	..	..	Certiorari, 1
— v. Wilson, 5 N. & M. 119, 164	..	..	..	..	Poor Rate ; Forcible Detainer
— v. Younghusband, 4 N. & M. 850	..	..	..	..	Criminal Information
Richardson v. Fell, 4 D. P. C. 10	..	..	..	..	Practice, 11
Richer, Ex parte, 4 D. P. C. 275	..	..	..	..	Prisoner, 8
Ridgeway v. Hungerford Market Company, 4 N. & M. 797	..	..	..	..	Master and Servant
Ripling v. Watts, 4 D. P. C. 290	..	..	..	..	Practice, 30
Ross, in re, 4 N. & M. 163	..	..	..	..	Attorney, 4
Saxon v. Swabey, 4 D. P. C. 105	..	..	..	..	Practice, 18
Scales v. Sargeason, 4 D. P. C. 231	..	..	..	..	Interpleader Act, 6
Scott v. Lewis, 2 C., M. & R. 289 ; 4 D. P. C. 259	..	..	..	..	Interpleader Act, 2
Sharpe v. Johnstone, 2 Bing. N. C. 246 ; 4 D. P. C. 324	..	..	..	..	Affidavit, 5
Short v. Doyle, 4 D. P. C. 202	..	..	..	..	Bail, 3
Simon v. Lloyd, 2 C., M. & R. 187	..	..	..	..	Bill of Exchange, 2
Simons v. Blake, 4 D. P. C. 263	..	..	..	..	Attorney, 15 ; Audita Querela
Simpson v. Clarke, 2 C., M. & R. 342	..	..	..	..	Bill of Exchange, 6

Smith, <i>Ex parte</i> , 5 N. & M. 145	Prohibition
— v. Sandys, 5 N. & M. 59	Prisoner, 1
— v. Johnson, 2 C., M. & R. 350; 4 D. P. C. 208	Process, 3
— v. Thomas, 2 Bing. N. C. 372	Slander, 1
Soady v. Wilson, 4 N. & M. 777	Sewer
Solly v. Neish, 2 C., M. & R. 355; 4 D. P. C. 248	Pleading, 6
Spencer v. Parry, 4 N. & M. 770	Assumpsit, 1
Startup v. Certani, 2 C., M. & R. 165	Contract of Sale
Stevens v. Mayor of Berwick-upon-Tweed, 4 D. P. C. 277	Practice, 26
Swain v. Lewis, 2 C., M. & R. 261; 4 D. P. C. 261	Bill of Exchange, 3
Sykes v. Haigh, 4 D. P. C. 114	Arbitration, 11
Taylor v. Wilkinson, 5 N. & M. 189	Bail, 1
Thomas v. Morgan, 4 D. P. C. 223	Pleading, 13
Trimingham v. Trimingham, 4 N. & M. 786	Arbitration, 2
Trinder v. Smedley, 5 N. & M. 38	Promissory Note, 1
Twigg v. Potts, 4 D. P. C. 266	Costs, 12, 13; Pleading, 12
Twiss v. Osborne, 4 D. P. C. 107	Costs, 9
Turner v. Unwin, 4 D. P. C. 16	Affidavit, 2
Tunno v. Morris, 2 C., M. & R. 299; 4 D. P. C. 224	County Court
Underden v. Burgess, 4 D. P. C. 104	Interpleader Act, 3
Verrall v. Robinson, 4 D. P. C. 242	Trover, 1
Vivian v. Jenkins, 5 N. & M. 14	Pleading, 3
Walsey v. Edwards, 4 D. P. C. 236	Practice, 23
Watkins v. Giles, 4 D. P. C. 14	Practice, 13
Watts v. Bury, 4 D. P. C. 44	Warrant of Attorney, 3
Wells v. Ody, 2 C., M. & R. 184	Building Act
Wheeler v. Whitmore, 4 D. P. C. 235	Writ of Trial Act, 2
Whittaker v. Mason, 2 Bing. N. C. 259	Pleading, 4
Wilkes v. Hungerford Market Company, 2 Bing. N. C. 281	Action on the Case
Wilkinson v. Time, 4 D. P. C. 37	Arbitration, 9
Williams v. Waring, 2 C., M. & R. 354; 4 D. P. C. 200	Prisoner, 1; Process, 4
Wilson v. Northern, 4 D. P. C. 212	Cognovit, 1
— v. Northop, 2 C., M. & R. 326	Practice, 7
— v. Price, 4 D. P. C. 213	Cognovit, 2
Wood v. Gompertz, 4 D. P. C. 277	Lords' Act, 2
— v. Wilson, 2 C., M. & R. 241	Arbitration, 5
Woollaston v. Weston, 4 D. P. C. 3	Attorney, 6
Woolright, <i>Ex parte</i> , 4 D. P. C. 274	Attorney, 16
Worley v. Harrison, 5 N. & M. 173	Promissory Note, 2
Worthington v. —, 2 C., M. & R. 315	Affidavit, 1; Practice, 6
— v. Prince, 4 D. P. C. 243	Pleading, 14
Wright v. Soresby, 2 C. & M. 671	Practice, 2
Yardley v. Jones, 4 D. P. C. 45	Process, 5
Yates v. Knight, 2 Bing. N. C. 273	Arbitration, 6
Yeatman, <i>Ex parte</i> , 4 D. P. C. 304	Attorney, 18
Yonde v. Yonde, 4 D. P. C. 32	Venue

EQUITY.

Amphlett v. Parker, R. & M. 221	.. .. .	Legacy, 6
Attorney-General v. Brasenose College, C. & F. 295	.. .. .	Charity, 2
———— v. Hungerford, C. & F. 257	.. .. .	Charity, 3
———— v. Mayor of Rochester, Sim. 273	.. .. .	Decree
Booker v. Allen, R. & M. 270	.. .. .	Portions, 4
Brown v. Pocock, Sim. 257	.. .. .	Will, 6
———— v. Tighe, Bli. 272	.. .. .	Landlord and Tenant
Burrell v. Nicholson, Sim. 212	.. .. .	Practice, 2
Campbell v. Harding, R. & M. 390; Sim. 283	.. .. .	Practice, 5; Will, 9
Carver v. Bowles, R. & M. 301, 304	.. .. .	Legacy, 1; Power, 1, 2
Casborne v. Barsham, Sim. 217	.. .. .	Insolvent
Cocker v. Lord Egmont, Sim. 311	.. .. .	Pleading, 4
Collinson v. Pater, R. & M. 344	.. .. .	Charity, 1
Dobree v. Schrode, Sim. 291	.. .. .	Ship
Donne v. Hart, R. & M. 360	.. .. .	Husband and Wife, 2
Dowling v. Tyrrell, R. & M. 343	.. .. .	Legacy, 5
Ellis v. Earl Grey, Sim. 214	.. .. .	Jurisdiction
Fradell v. Weller, R. & M. 247	.. .. .	Copyright, 1, 2
Galway v. Galway, R. & M. 215	.. .. .	Receiver, 2, 3
Gibbons v. Langdon, Sim. 260	.. .. .	Will, 5
Gill v. Shelley, R. & M. 336	.. .. .	Legacy, 4
Green v. Jackson, R. & M. 239	.. .. .	Legacy, 3
Harmer v. Westmacott, Sim. 284	.. .. .	Newspaper
Harrison v. Boydell, Sim. 211	.. .. .	Receiver, 1
Hasluck v. Stewart, Sim. 321	.. .. .	Practice, 7
Heslop v. The Bank of England, Sim. 192	.. .. .	Practice, 10
Howard v. Earl Digby, Bli. 224	.. .. .	Lunatic, 1
Howarth v. Smith, Sim. 161	.. .. .	Vendor and Purchaser
Jackson, Exp. Sim. 212	.. .. .	Infant
Jones v. Torin, Sim. 255	.. .. .	Will, 7
Langston v. Langston, C. & F. 194; Bli. 167	.. .. .	Will, 8
Laurence v. Halliday, Sim. 296	.. .. .	Practice, 4
Lepine v. Ferard, R. & M. 378	.. .. .	Will, 2, 10

Lewes v. Lewes, Sim. 304	.. .. .	Alienation
Lewis v. Edmunds, Sim. 235	.. .. .	Pleading, 3
Lloyd v. Harvey, R. & M. 310	.. .. .	Portions, 5
Macartney v. Graham, R. & M. 353	.. .. .	Costs, 2
Malcomb v. Taylor, R. & M. 416	.. .. .	Will, 1
Major v. Lansley, R. & M. 359	.. .. .	Husband and Wife, 3
Metcalf v. The Archbishop of York, Sim. 224	.. .. .	Benefice
Meux v. Bell, Sim. 175	.. .. .	Pleading, 2
Milligan v. Mitchell, Sim. 186	.. .. .	Practice, 9
North v. Martin, Sim. 266	.. .. .	Settlement
Oldaker v. Lavender, Sim. 239	.. .. .	Partnership, 2
Peake v. Gibbon, M. & R. 354	.. .. .	Costs, 1
Prentice v. Mensal, Sim. 271	.. .. .	Practice, 3
Prestwidge v. Groombridge, Sim. 171	.. .. .	Will, 3
Richards v. Davies, R. & M. 347	.. .. .	Partnership
Robins, In re, R. & M. 448	.. .. .	Lunatic, 2
Sheffield v. The Earl of Coventry, R. & M. 317	.. .. .	Legacy, 7, 8; Portions, 2, 3
Simpson v. Jones, R. & M. 365	.. .. .	Husband and Wife, 1
Smith v. Nethersole, R. & M. 450	.. .. .	Ne Exeat Regno
Strong v. Ingram, Sim. 197	.. .. .	Legacy, 2, 9
Swindell v. Swindell, Sim. 295	.. .. .	Practice, 6
Taylor v. Tabrum, Sim. 281	.. .. .	Pleading, 1; Timber
— v. Taylor, Sim. 246	.. .. .	Will, 4, 11
Ullock v. Barber, Sim. 300	.. .. .	Bankrupt
Weall v. Rice, R. & M. 251	.. .. .	Portion, 1
Williams v. Townsend, Sim. 296	.. .. .	Practice, 1
Wollams v. Baker, Sim. 316	.. .. .	Practice, 8
Wood v. Skelton, Sim. 176	.. .. .	Descent

BANKRUPTCY.

Barrington, Exp. M. & A. 255	..	..	..	..	..	Insolvent
Benham, Exp. M. & A. 272	..	..	..	..	..	Assignees, 3
Bennett, Exp. M. & A. 306	..	..	..	..	..	Solicitor
Boardman, Exp. M. & A. 209	..	..	..	..	..	Supersedes
Branskill, Exp. M. & A. 220	..	..	..	..	..	Proof, 2
Chippendale, Exp. M. & A. 299	..	..	..	..	..	Equitable Mortgage, 2
Copeland, Exp. M. & A. 167	..	..	..	..	..	Partnership
Douglas, Exp. M. & A. 218	..	..	..	..	..	Commissioners, 2
Halford, Exp. M. & A. 189	..	..	..	..	..	Interest
Hall, Exp. M. & A. 294	..	..	..	..	..	Commissioners, 1
Hyslop, Exp. M. & A. 289	..	..	..	..	..	Assignees, 1
Jones, Exp. M. & A. 193	..	..	..	..	..	Proof, 3
Kensington, Exp. M. & A. 300	..	..	..	..	..	Equitable Mortgage, 1
Living, Exp. M. & A. 223	..	..	..	..	..	Mortgage
Llewellyn, Exp. M. & A. 298	..	..	..	..	..	Fiat, 2
Martin, Exp. M. & A. 293	..	..	..	..	..	Fiat, 3
Masterman, Exp. M. & A. 209	..	..	..	..	..	Reputed Ownership, 1
Porter, Exp. M. & A. 220, 281	..	..	..	..	..	Costs; Proof, 4
Race, Exp. M. & A. 342	..	..	..	..	..	Practice, 1
Simpson, Exp. M. & A. 294	..	..	..	..	..	Assignee, 2
Smith, Exp. M. & A. 213	..	..	..	..	..	Practice, 2
Walton, Exp. M. & A. 242	..	..	..	..	..	Trustee, 2
Watkins, Exp. M. & A. 348	..	..	..	..	..	Reputed Ownership, 2, 3
Whish, Exp. M. & A. 114	..	..	..	..	..	Trustee, 1
Willman, in the matter of, M. & A. 292	..	..	..	..	..	Fiat, 1
Younge, Exp. M. & A. 228	..	..	..	..	..	Proof, 1

TABLE showing the Operation of the BANKRUPTCY SYSTEM.

THE object in constructing the following Table has been to exhibit, in a compendious form, the operation of the present system in Bankruptcy, so far as regards the period of distribution—the comparative amount of assets collected and divided, and the actual amount of expenditure reduced under its several heads, with a view to the easier suggestion of means both of greater expedition and further reduction of expenditure, wherever it may be found practicable, and at the same time of meeting and answering such objections as may be founded in ignorance or error.

A single division of the Court has been taken as an average specimen, being that in which the constructor of the table himself presides, and is consequently enabled to vouch for the general accuracy of the statement.

The period selected is the first three years after the institution of the Court, together with an additional term of six months, so as to include the working of those flats which were adjudicated during the last six months of the first-named period: thus it appears, that of the total number of 266 flats adjudicated in this division of the Court between January 1832 and January 1835, there were 152 in which dividends had been declared previous to the month of July 1835; and if upon comparison with a like number of successive commissions worked during any period under the old system, it shall be found (as is believed to be the case) that the proportion of the last-mentioned commissions, in which dividends were declared, is considerably smaller than that which the present table exhibits, the inference will, to that extent, be in favour of the present over the former system.

The next point of comparison will be as to the average length of time between the adjudication and the declaration of the first dividend, and (again) between the adjudication and the declaration of the final dividend in those cases where more than a single dividend has been declared: this is obviously a point of the greatest importance as it regards the working of the system, and as such will be freely admitted by all who have had the smallest experience in commercial matters: here it is also that the present table will be found to exhibit the most marked superiority in the new system over that which it has superseded, both as regards the duration of the respective periods and the very great reduction in the number of dividend meetings, which it was previously as much the interest of practitioners to multiply as it is now that of the official assignees to reduce within the narrowest compass: at present it may be safely pronounced both that the great majority of estates are fully distributed at a single meeting, and that whenever two or more have been found necessary, by far the largest portion of the funds has been distributed at the first. It will also be observed, that the *average* time of declaring the first dividend is now very nearly as early as the shortest time which the law allows, viz. four months from the date of adjudication: and it may be added, that in a great number of cases—those more particularly of the smaller classes of tradesmen, where the greatest amount of distress is frequently occasioned to those descriptions of creditors who are least able to bear the evils of procrastination—the period might with perfect safety be yet materially shortened, so as to reduce the months to weeks, if the legislature should think fit to invest the commissioner with a discretionary power so to direct.

A third criterion may be formed by taking indiscriminately an equal number of commissions worked under the former system to that of flats now exhibited, and comparing the average amount of assets—first, as stated in the balance sheets of the bankrupts; secondly, as collected; and thirdly, as ultimately distributed; in all which respects, to whatever extent the proportion of the second amount to the first, or of the last to the two former, shall be found (under the present system) to exceed that which it was under the old system, so much is to be placed to the

credit of the superior diligence and activity of the official assignee over those by whom the affairs of bankrupts were formerly conducted, and (generally) of the amended economy of the entire system. A lesser but not unimportant point of comparison will be as to the number and amount of debts collected in proportion to the total assets, which (again) if it shall be found greatly to exceed the average number and amount of those which were recovered under the former system, must be set down to the same account as the preceding; and this is more especially observable in the case of *small debts*—the number of these falling short of £10 being to be set down almost wholly to the credit of the new system—the like description of debts, under the old, having been generally disregarded as scarce worth the trouble or answerable to the expense attending the collection, and being consequently almost a dead loss to the estate.

The amount of expenditure has, as already observed, been classed under the several ordinary heads, for the purpose of facilitating the object of further reduction in such instances where it may be supposed to be practicable, and the average amount of per centage under each head has been calculated with a view to the prevention and correction of mis-statements.

Lastly, the principal object in classing the several estates according to the amount of property distributed, has been to show the proportion which the weight of expenditure, in its several items, bears to the amount of property in estates of different degrees of magnitude—as to which many points may suggest themselves as fit for the consideration of the legislature, whenever the subject shall be again laid fully before it.

Explanation as to the several Heads of Expenditure.

- 1st. *Solicitor*.—This head contains the amount of the several solicitors' bills, and it may be more generally stated under the term "Law Expenses;" but in comparing the amount with that of the solicitors' bills in commissions under the former system, it should be remembered that those bills included some items of expenditure now abolished or transferred to other heads of expenditure; as for example, the fees paid to the commissioners (for which the regulated fees of Court are now substituted), and the charges attending the collection of assets and payment of dividends, which, together with others, are now provided for under the head of remuneration to the official assignee; but independently of these alterations of the practice in bankruptcy, it is believed that a very great diminution will be found in the average amount of this head of expenditure, arising principally from the greater despatch of proceedings, and the prevention of fruitless litigation.
 - 2d. *Messenger*.—A considerable reduction will be found under this head of expenditure, owing to the new arrangements consequent on the establishment of the present Court of Bankruptcy: the chief items in the messenger's bills are those connected with keeping possession.
 - 3d. *Official Assignee*.—This is the amount of per centage allowed to the official assignee, according to a general scale of remuneration as regulated by the commissioners. It should be observed, that this per centage covers the whole of the charges allowed to accountants under the former system: which in the larger estates were often enormous.
 - 4th. *Sale*.—This head includes, besides the auctioneer's charges, such heads of incidental expenses attending the sale of property as do not fall within either of the preceding heads.
 - 5th. *Fees, &c.*—This head includes the fees of Court as regulated by act of parliament, together with the petty expenses of stationery and postages not comprised in either of the foregoing heads.
- N. B. The difference between the gross amount of property collected and the amount of net proceeds, consists principally of the following articles, viz rent and taxes, servants' wages, and bankrupt's allowance for maintenance; which may be more fitly classed as *outgoings* than as forming distinct heads of expenditure.

**GENERAL RESULTS on all FIATS (152 in Number) in which
Commissioners of Bankrupt, between the 11th January
July, 1835.**

Estates classed according to the amount of dividend.	Estate of C. J. Lancaster, highest amount of dividend.	CLASS I. 20 estates from £1800 to £20,000, including Lancaster.	CLASS II. 20 estates from £600 to £1800.	CLASS III. 20 estates from £400 to £600.
Average time from date of adjudication to first dividend	4 months	5½ months	7½ months	6½ months
Do. to final div. (in cases concluded)	not concluded	12 months	18 months	14 months
Actual amount divided	£19,380	132,546	20,695	11,194
Average rate of dividend	5s. 6d.	7s.	6s.	5s.
Amount of good debts, per balance-sheet, due to the estate	£5925	87,033	16,338	21,501
Total amount of property, per ditto	£27,925	246,682	43,082	40,328
Amount of debts collected	£4536	61,167	12,093	7160
Amount of property collected	£20,280	165,327	33,619	17,697
Total No. of debts stated	31	3109	1487	1302
Do. of debts collected	31	2688	1200	788
No. of debts below £10 stated .. } Do. collected	all above	1900 1720	1103 920	960 618
Amount of net proceeds	£25,670	158,205	29,970	15,092
Expenses.—1. Solicitor	676	4540	1833	1623
2. Messenger	26	707	529	475
3. Official assignee	552	5829	1314	1012
4. Sale	None	2103	1093	900
5. Fees, &c.	282	1861	918	800
Total expenses	£1536=6 pr. ct. on net proceeds.	£15,040=9½ per cent.	£5687=19 per cent.	£4810=31 per cent.
Expected amount of assets, and further dividend on estates not yet wound up	About £5000 in hand, and a further dividend of 1s. expected.	£10,000 in hand, about 8d. on 16 estates.	£5000 in hand, 2s. on 6 estates.	£1700 in hand, 14d. on 7 estates.

debtors have been declared in the Court of one of the
when the Court was instituted, and the Month of

CLASS IV. 20 estates from £50 to £400.	CLASS V. 20 estates from £145 to £250.	CLASS VI. 20 estates from £250 to £145.	CLASS VII. 20 estates from £30 to £80.	CLASS VIII. 12 estates from £10 to £30.	Total results on 152 estates.
Months	7 months	9 months	10 months	8 months	8 months
Months	11 months	10 mths on 17 ests	11 mths on 19 ests	8½ mths on 11 ests	12 ½ months
164	4094	2078	1134	276	178,585
4s.	3s.	2s.	2s.	6d.	3s. 10½d.
197	4340	1899	2879	1144	142,531
165	18,092	12,604	5867	4388	390,508
26	2633	1615	1590	522	90,916
118	10,113	7740	4761	2292	252,967
29	792	300	561	159	8649
23	478	183	318	104	6482
26	708	185	502	135	6319
59	430	104	288	93	4832
26	8083	5870	3990	1745	232,431
74	1297	1601	1195	475	13,938
90	549	433	309	196	3606
91	531	376	226	137	9976
97	515	415	214	144	5791
12	740	718	710	408	6867
per	£3632=45 per cent.	£3543=60 per cent.	£2654=66½ per cent.	£1360=78 per cent.	£40,178=17½ per cent.
hand, in estates.	£300 in hand, 6d. on 4 estates.	£142 in hand, 4d. on 3 estates.	£13 in hand, 4d. on 1 estate.	£62 in hand, 1s. 6d. on 1 estate.	42 estates not concluded.

FOREIGN JURIDICAL INTELLIGENCE.

Our principal correspondent at Paris, M. Fœlix, writes as follows:—

"Since my last account was inserted in the Law Magazine, M. Troplong, whose *Commentaire sur les Titres du Code Civil des Privilèges et Hypothèques et de la Vente*, I have already mentioned has also published, "*Commentaire sur les Titres des Prescriptions*," which is in no way inferior to the former. We find in it comparatively even a greater scientific development without any neglect of practical demonstration. M. Troplong, as an acknowledgment of the merit of his work, has been appointed Counsellor to the Court of Cassation in Paris.

Of the work of *Toulliers (Droit Civil François)*, ending with the "*Titres du Code Civil du Contrat de Mariage*," the continuation of which is to be made by M. Duvergier in Paris, two volumes have appeared, comprising the titles *de la Vente et de l'Echange*. This work is also of great merit, both scientifically and practically considered. It is difficult to say which of the two on the same subject deserves the preference. M. Duvergier, in consequence of Troplong's work appearing first, had the advantage of making his own at least equally perfect, and of being able to criticise the errors which he thought he had found in the former.

M. Parant, Avocat-Général à la Cour de Cassation, has published "*Lois de la Presse en 1834*," which reduces the French legislation on the press, a true chaos, to a clear system, and adds, for the advantage of practical men, all the decisions of the superior Courts. As his work appeared before the new laws on the press of December 9th, 1835, M. Parant will do well to publish a new edition comprising those laws. A work has certainly appeared containing those laws, viz. "*Code annoté de la Presse*," by *Celliez*; but this book, although a useful collection, is much less complete and clear than Parant's.

The work entitled "*Nouveau Dictionnaire de Police*," by MM. Elouin and Trebuchet, employés of the Préfecture de Police in Paris, replaces the older one by Alletz, entitled "*Dictionnaire de Police Moderne*." It contains, in alphabetical order, every thing relating to the measures of government for the maintenance of public order, the protection of property, and individual liberty and security.

The work entitled "*Cours de Droit Administratif, appliqué aux Travaux Publiques*," by M. Cotellet, treats in a profound and intelligible manner on the subjects of roads, railroads, navigable rivers, canals, and hydraulic works of every kind, mines, foundries, &c.

"*Traité des Assurances Terrestres*," by M. Persil, (son of the minister of justice,) and "*Commentaire sur le Titre des Commissionnaires et le Titre des Achats et Vente*," &c. the "*Code de Commerce*," by the same, are works of practical utility.

"*Cours de Procédure Civile Française*," by M. Rauter, professor at Strasburgh, and member of the chamber of deputies. This book reduces French procedure to a clear and intelligible scientific system, and will greatly facilitate the study of this subject to foreigners and law students.

"*Dictionnaire Général et Raisonné de Legislation, de Doctrine et de Jurisprudence en Matière Civile, Commerciale, Criminelle, et de Droit Publique*, par M. Armand

¹ A full account of French procedure in civil cases was given in the Law Magazine, vol. i. p. 461, *et seq.*

Delos." This is a very useful work, containing short but complete and comprehensive notices of all subjects of French law, somewhat on the plan of Tomlins' Law Dictionary. It is to be in 8 vols. quarto, of which two have appeared. The brother of the author publishes a collection of judgments of the higher Courts of France, to which the work just mentioned forms an index.

Sirey, Table tricennale, ou Jurisprudence du 19e Siècle. M. Sirey publishes a similar collection, of which the present is an alphabetical index; but it is valuable of itself in consequence of the completeness of the notices it contains.

"*Dictionnaire de la Législation usuelle,*" by M. de Chabrot: a work after the plan of "Every Englishman his own Lawyer," by Gifford.

"*Manuel des Etudiants en Droit et des Jeunes Avocats,*" by M. Dupin the elder. The author, formerly advocate, and now procureur-general at the Court of Cassation and president of the Chamber of Deputies, has collected in this work several of his essays previously published, the principal of which is that "On the free Defence of the accused."

"*De l'Instruction Criminelle,*" by M. Carnot, vol. 4. This fourth volume is an appendix to the three first of this valuable work, whose author, late counsellor of the Cour de Cassation, died immediately after its appearance.

"*Théorie du Code Penal,*" by M. Chauveau, advocate at the same Court, and Helie, a functionary in the ministry of justice. This is the first systematic work on the French criminal code.¹ The authors, like Toulliers and Boncenne, in their works on the Code Civil, and the Code de Procédure Civile, have united the theory with the practice, and furnished a highly useful work. M. Parant, of whom we have already spoken, has, as a member of the Chamber of Deputies, proposed a bill for the abolition of *majorats*, which has passed into a law. It fixes that the *majorats* now existing are to continue in force for two other generations. At the same time the founder, if still alive, is permitted either to remodel it, or to set it aside altogether. M. Parant has now published a commentary on the new law, which gives a very complete account of the subject of *majorats*.

Besides the collection of laws and ordinances by Duvergier, which is still the best and most perfect, two cheaper ones have lately been begun, the one under the title "*Bulletin annoté des Lois,*" by Lepec; the other by the editors of a *Journal des Avocats et Notaires*.

"*Dictionnaire de l'Enregistrement,*" by Trouillet: a new edition of an older work, which gives a complete account of the subject of this particular tax.

"*Traité des Droits d'Enregistrement,*" by Championniere et Regaud. This is the first work which has brought the raising of this tax into connection with general legislature, and systematized it.

"*Code Universitaire,*" by Rendu, 2d ed. A collection of all the laws and ordinances relating to the French University. The author has long been member of the supreme council of this institution.

"*Tableau analytique et synoptique du Droit des Gens,*" by Cantener, advocate at Colmar. This is a tabular view of the work of Professor Hepp, of Strasburg, formerly noticed.

"*Théorie de l'Annullité des Conventions et des Actes de tout genre en Matière civile,*" by M. Solon. The author has already made himself a name by several legal works, and the present one has done full justice to a delicate subject.

¹ An account of the history and present state of the French criminal law was given in the Law Magazine, vol. viii. p. 289.

"*De la Législation Française, Musulmane et Juive à Alger*," by Pharaon. This work displays no science on the part of the author, but still it contains many useful notices.

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"*De la Législation en matière d'Interpretation des Loix en France*," by M. Faucher, avocat-général at Rennes, is a pamphlet called forth in consequence of a bill laid before the Chambers on the competency of the Courts of Justice. By one of the clauses of this bill, it is proposed that in future no authentic or legislative interpretation shall take place, but that all shall depend on the interpretation of the tribunals.

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"*Manuel de Droit Ecclésiastique*," by M. Henrion. An extract from the larger work of the same author, called "*Code Ecclésiastique Français*;" it contains a short account of the French laws concerning the Roman Catholic Church.

"*Traité de Législation*," by M. Comte, 2d ed. 4 vols. Concerning the insignificance of this work there is but one opinion, in Germany at least.

"*Au-delà du Rhin*," by M. Lermnier. The author has expatiated as well on the literature as on the legislation and politics of Germany. But according to the best informed on those subjects, he has only proved his want of information relating to them.

The second volume of Professor Foucart of Poitiers's "*Elémens du Droit Public et Administratif*," which we have noticed before, has now appeared, with which this elementary work is completed. It briefly comprises the whole system of the internal administration of France. It is, however, nothing but a recast of the "*Instituts du Droit Administratif*," by M. le Baron de Gerando, from which M. Foucart has even borrowed the errors.

At the same time has appeared a supplementary volume of Gerando's above-mentioned work, a work whose merit has long been acknowledged, and which was published in 1829-30, in 4 vols. This supplementary volume, published by M. Boulatoner, contains the laws on this subject published since, with notes and statements of the decisions of the council of state.

"*Droit Public et Administratif Français*," by M. Bouchéné Lefer, *Maître des Requêtes au Conseil d'Etat*. Two volumes of this work had appeared already; two others have now come out, and two or three more are to be expected. This work is distinguished from that of M. de Gerando by its greater extent, so that if the latter be the Institutes, the former forms the Pandects of the French public and administrative laws. Both authors have chronicled and systematically arranged all the laws concerning public functionaries and the citizens at large, i. e. all regulations relating to the administration of the state, the relations and connections between the state as a moral person on one hand and the individual citizen on the other. They consist of laws, decrees, ordinances, instructions of ministers and other high func-

tionaries, and had previously not been all published ; but the two authors, in consequence of the offices they hold, were able to discover all these regulations. The work by Bouchéné Lefer is indispensable to every practical man in France.

"*Pratique du Code Penal*," by M. Garnier Dubourgneuf, Advocate-General at the Court of Appeal at Riom. This work contains, in notes appended to every article, an extract and comparison of the different commentaries and judgments given by the superior Courts.

"*Histoire Parlementaire de la Revolution Française*," by MM. Bouchez and Roux. Of this work, which gives a full account of all the transactions of the French legislative assemblies since 1829, twenty-four volumes have now been published."

The *Revue Etrangère et Française de Legislation, &c.* edited by M. Fœlix, is continued with unabated spirit and ability. A daily paper, devoted to jurisprudence, entitled *Le Droit*, has also been started in Paris, under the editorship of M. Lermnier, whose known talents and energy afford the best guarantee for its success. The first number, (Dec. 1st, 1835,) however, contains an Introduction from which we cannot help inferring that M. Lermnier is not quite so well informed as to the state of Legislation and Jurisprudence in other countries as he might have been. His account of England, for example, runs thus :—

" England is endowed with a living legality, represented by men rather than by books. There, manners are continually reforming laws. From the commencement of the nineteenth century [within the last eight years only] the civil law, the criminal law, and the political legislature have been amended amongst our neighbours by prudent and successive innovations. Each party has its juriconsults : the Tories boast of Sir Robert Peel : the Whigs of Henry Brougham. We shall study the works of these two *hommes savans et politiques*. The theories of Bentham have acquired numerous partisans amongst the younger juriconsults [they must be young indeed]. We shall particularly examine, in their application, the doctrines of the illustrious Englishman. Mr. Austin, professor at the New University of London, and Mr. ———, editor of the Law Magazine, will engage with us in an exchange of ideas and works. The other celebrated jurists of England, the Coopers, the Roscoes, the John Romillys, the Chadwicks, have acquired, be it at the bar, be it in the magistracy, a shining notability (*notabilité éclatante*), the titles to which we shall make known to France. Frequent correspondence and journeys will strengthen our relations with liberal and glorious England."

The Tories are certainly proud of Sir Robert Peel as one of the most accomplished statesmen of the age, and the reforms of the criminal law instituted by him are regarded by the whole country as an enduring benefit conferred upon it ; but the Tories would never think of naming him amongst juriconsults, and we should be very much surprised to learn that the Whigs are proud of Lord Brougham in that capacity. We cannot say to what works M. Lermnier alludes, for we never heard of any, unless speeches are to rank as such. The statement as to Bentham is notoriously contrary to the fact, and the list of celebrated jurists is ludicrous. In the first place, neither of the gentlemen mentioned have any connection whatever with the magistracy ; in the second place, neither of them has acquired a *notabilité éclatante* at all, except Mr. Chadwick, whose name and fame are owing to his valuable labours in the department of Political Economy exclusively. For the rest, Mr. Cooper is the author of some works of great merit, but their very names are unknown beyond a limited circle in this country : Mr. Roscoe is the author of some excellent practical law books, and is also creditably distinguished as a writer of legal biography : and Mr. John Romilly is highly respected as a man of general

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"*Traité de Législation*," by M. Comte, 2d ed. 4 vols. Concerning the insignificance of this work there is but one opinion, in Germany at least.

"*Au-delà du Rhin*," by M. Lermnier. The author has expatiated as well on the literature as on the legislation and politics of Germany. But according to the best informed on those subjects, he has only proved his want of information relating to them.

The second volume of Professor Foucart of Poitiers's "*Elémens du Droit Public et Administratif*," which we have noticed before, has now appeared, with which this elementary work is completed. It briefly comprises the whole system of the internal administration of France. It is, however, nothing but a recast of the "*Instituts du Droit Administratif*," by M. le Baron de Gerando, from which M. Foucart has even borrowed the errors.

At the same time has appeared a supplementary volume of Gerando's above-mentioned work, a work whose merit has long been acknowledged, and which was published in 1829-30, in 4 vols. This supplementary volume, published by M. Boulouner, contains the laws on this subject published since, with notes and statements of the decisions of the council of state.

"*Droit Public et Administratif Français*," by M. Bouchéné Lefer, *Maitre des Requêtes au Conseil d'Etat*. Two volumes of this work had appeared already; two others have now come out, and two or three more are to be expected. This work is distinguished from that of M. de Gerando by its greater extent, so that if the latter be the Institutes, the former forms the Pandects of the French public and administrative laws. Both authors have chronicled and systematically arranged all the laws concerning public functionaries and the citizens at large, i. e. all regulations relating to the administration of the state, the relations and connections between the state as a moral person on one hand and the individual citizen on the other. They consist of laws, decrees, ordinances, instructions of ministers and other high func-

tionaries, and had previously not been all published ; but the two authors, in consequence of the offices they hold, were able to discover all these regulations. The work by Bouchéné Lefer is indispensable to every practical man in France.

"*Pratique du Code Penal*," by M. Garnier Dubourgneuf, Advocate-General at the Court of Appeal at Riom. This work contains, in notes appended to every article, an extract and comparison of the different commentaries and judgments given by the superior Courts.

"*Histoire Parlementaire de la Revolution Française*," by MM. Bouchez and Roux. Of this work, which gives a full account of all the transactions of the French legislative assemblies since 1829, twenty-four volumes have now been published."

The *Revue Etrangère et Française de Legislation*, &c. edited by M. Fœlix, is continued with unabated spirit and ability. A daily paper, devoted to jurisprudence, entitled *Le Droit*, has also been started in Paris, under the editorship of M. Lermnier, whose known talents and energy afford the best guarantee for its success. The first number, (Dec. 1st, 1835,) however, contains an Introduction from which we cannot help inferring that M. Lermnier is not quite so well informed as to the state of Legislation and Jurisprudence in other countries as he might have been. His account of England, for example, runs thus :—

"England is endowed with a living legality, represented by men rather than by books. There, manners are continually reforming laws. From the commencement of the nineteenth century [within the last eight years only] the civil law, the criminal law, and the political legislature have been amended amongst our neighbours by prudent and successive innovations. Each party has its juriconsults : the Tories boast of Sir Robert Peel : the Whigs of Henry Brougham. We shall study the works of these two *hommes savans et politiques*. The theories of Bentham have acquired numerous partisans amongst the younger juriconsults [they must be young indeed]. We shall particularly examine, in their application, the doctrines of the illustrious Englishman. Mr. Austin, professor at the New University of London, and Mr. ———, editor of the Law Magazine, will engage with us in an exchange of ideas and works. The other celebrated jurists of England, the Coopers, the Roscoes, the John Romillys, the Chadwicks, have acquired, be it at the bar, be it in the magistracy, a shining notability (*notabilité éclatante*), the titles to which we shall make known to France. Frequent correspondence and journeys will strengthen our relations with liberal and glorious England."

The Tories are certainly proud of Sir Robert Peel as one of the most accomplished statesmen of the age, and the reforms of the criminal law instituted by him are regarded by the whole country as an enduring benefit conferred upon it ; but the Tories would never think of naming him amongst juriconsults, and we should be very much surprised to learn that the Whigs are proud of Lord Brougham in that capacity. We cannot say to what works M. Lermnier alludes, for we never heard of any, unless speeches are to rank as such. The statement as to Bentham is notoriously contrary to the fact, and the list of celebrated jurists is ludicrous. In the first place, neither of the gentlemen mentioned have any connection whatever with the magistracy ; in the second place, neither of them has acquired a *notabilité éclatante* at all, except Mr. Chadwick, whose name and fame are owing to his valuable labours in the department of Political Economy exclusively. For the rest, Mr. Cooper is the author of some works of great merit, but their very names are unknown beyond a limited circle in this country : Mr. Roscoe is the author of some excellent practical law books, and is also creditably distinguished as a writer of legal biography : and Mr. John Romilly is highly respected as a man of general

hope you don't call that disgracing the profession." Sir John Campbell, like a true Scot, would doubtless consider Davy in the right; but Davy did not commit the blunder of first declaring that his honour required him to take gold. In our opinion Sir John Campbell would have stood much better with the profession had he struck for the Chancellorship at once; the refusal of which in the first instance was the true affront to resent. It is a singular fact, that the Solicitor-General has not even been named amongst the candidates.

The appointment of the new Master of the Rolls appears to be universally approved, and we must do the ministry the justice to say that their new Chancellor was probably the very best they could procure: but we hope that they have not appointed him in the expectation that his political functions are likely soon to terminate by the separation of the duties of the office, for to the best of our information the measure will most assuredly be thrown out. Since the article (*ante*, p. 128) was in type, Mr. Lynch has published a pamphlet, in which he makes a weak attempt to justify the appointment of the late Master of the Rolls and the Vice-Chancellor as Commissioners of the Great Seal, and develops a plan of his own for the better dispatch of equity business, and the establishment of an effective Court of Appeal. There is nothing in this pamphlet calling on us to modify our own opinions in any respect but one. From Mr. Lynch's statements it certainly does appear that the effect of the Commission in causing arrears to accumulate has been somewhat exaggerated, but it is equally illogical to attribute that arrear exclusively to the multifarious duties of the Chancellorship. Let there be a sufficient number of competent equity judges in the first instance, with a single stage of appeal, and a widely different state of things would be the result. The principal objection, however, to Mr. Lynch's mode of reasoning is, that he invariably mistakes assumption for argument; *e.g.* "At any rate, one certain good has been attained, that is to say, one objection which lay in the way of improvement has been removed: it has been proved that the Cabinet may proceed with their consultations without a Lord Chancellor." About as much as it was proved in November, 1834, during Sir Robert Peel's absence, that the government might proceed without a Cabinet,—even admitting that no inconvenience *has* been experienced from the absence of the head of the law in the Cabinet. But will Mr. Lynch have the goodness to explain how it came to pass that law-reform had become a dead letter to all practical purposes during the whole of the last session; why the principal measure of that session (the Municipal Corporation Bill) was defaced by legal blunders of the most discreditable sort, and what sort of a fight would have been made by the ministry had not Lord Brougham volunteered to encounter the legal assailants of their measures in the House of Lords?

There is one mistake or omission in the Municipal Bill, by which a considerable number of the profession are likely to suffer, and therefore it becomes necessary to allude to it. Under the section (s. 20) empowering the Treasury to make an order on the council of each borough for the repayment of the sums paid to barristers for revising the burgess lists, the Lords Commissioners conceive that they have no right to include payments made in respect of days spent in travelling. They consequently refuse to make any allowance (beyond bare expenses) in respect of such days to the barristers; who accepted the appointments upon the understanding that they were to stand upon precisely the same footing as under the Reform Bill, under which travelling days have been uniformly allowed. The injustice of this construction may be estimated from an instance. One gentleman travelled to the extreme North to revise a single borough, which occupied him a day; his charge was for one day actually employed in revising, and six or seven days (to the best

of our information) in travelling, at the rate of about one hundred miles a day. The Commissioners refuse to pay him more than five guineas for his seven or eight days' work, of which the travelling portion was by no means the most agreeable. This is an extreme case; but cases of four or five days' travelling to do four or five days' work, are common, and the average reduction will be probably a third¹. Now whatever people may think, five guineas a day during the sitting of the Courts is the very lowest rate at which competent men could be obtained; we state as a fact beyond dispute, that a full half would have thrown up the appointments immediately had any such construction been announced; and the question therefore is, whether the government are justified in departing from what (by clear implication) may fairly be regarded as a contract, because they have forfeited their own right to repayment by reason of an omission in a bill prepared and carried by themselves. That it was an unintentional omission, is avowed.

It may serve to dissipate any remaining uncertainty, to state that the doubt concerning the power of the council to elect a mayor, is generally regarded as ridiculous. At all events, there was never the least ground to apprehend any unpleasant consequences from acting on the supposition of such a power, as an amending and indemnifying bill would have set every thing to rights.

It is rumoured that a new batch of king's counsel is about to be made from among the members of the Chancery Bar. "I believe (says Sir Edward Sugden, in his Letter to Lord Melbourne) the true way to recruit the inside of the Bar is not by batches, but by steadily advancing individuals, as their claims appear by the exhibition of talents, learning, good conduct, and a command¹ of business." The demand for silk would have been much lowered had no other claims been attended to. At present, we may say of king's counsel what the Duchess of Gordon said of Pitt's peers, that it is difficult to spit out of window without spitting upon one—or, if Pelham was right in saying that it is no longer gentlemanly to be in the peerage, we may safely say, upon the same principle, that it is no longer gentlemanly to sit within the Bar.

It seems that the power of granting law-degrees is to be vested in a sort of metropolitan university. When we know a little more of the constitution of the faculty, and the other details of the plan, we may enter upon the consideration of its expediency.

A rumour has reached us that an attempt is about to be made to extend the jurisdiction of the Westminster Court of Requests, upon the application, not of the suitors, but of the commissioners, who consist at present of 242 tradesmen, mostly of the inferior order, elected by the vestries. This is a species of jurisdiction which should always be regarded with jealousy; and the late case of Soames and Rawlings, affords a strong presumption that the jurisdiction should be rather restricted than extended: for, if we are to take the gentlemen (Messrs. Fenn and Walker) who appeared to justify the decision of their Court in the above case before the Exchequer as a specimen, we should certainly say, that there were more Dogberries than Lycurguses upon the lists of judges, of whom any three may decide without appeal. Besides, an easy and expeditious mode of recovering

¹ We have heard it objected, that the Judges should not have appointed so many; but this, admitting its truth, is no answer to the barrister. Besides, the general expectation was, that the contest would be a protracted one; and we know instances in which it was made a matter of serious consideration whether two barristers would be enough for a single place.

debts accruing within the liberty of Westminster, is already afforded by the Palace Court, where a competent judge presides, and a regular system of procedure is pursued. (See 10 L. M. 167.)

The case of the Rev. Mr. Rowlatt has been so thoroughly exhausted by the press, that we should merely weary our readers by detailing it. But considering that a promise of the first suitable preferment was conveyed to Mr. Rowlatt at Lord Brougham's desire on the very day he took his seat as Chancellor in November 1830, and that not so much as a make-believe of performance was attempted till he was on the point of leaving office in November 1834, we may fairly make a memorandum of the incident as a striking illustration of Lord Brougham's peculiar notions of benevolence, which exactly coincide with those of Mr. Peter Pounce. "Sir," said Adama, "my definition of charity is a generous disposition to relieve the distressed." "There is something in that definition," answered Peter, "which I like well enough. It is, as you say, a disposition—and does not so much consist in the act as in the disposition to do it." A friend of ours is at present engaged in a dramatic scene on the plan of the third scene in the fifth act of *Richard the Third*, in which Lord Brougham is to be haunted by the ghosts of those who have suffered by confiding in him. It is to be hoped, however, that the earliest opportunity will be taken of compensating Mr. Rowlatt for a disappointment, which, from whatever quarter it fell, was an unmerited one.

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THE LAW MAGAZINE.

ART I.—TRIAL OF LA RONCIÈRE.

Procès du Sieur de la Roncière. Paris. 1835. 8vo.

M. GUIZOT, in his remarkable history of the progress of Civilization in France, institutes a comparison between the civilization of France and that of the other leading European countries; and as he passes the latter successively in review, he gives his reasons for holding that the civilization of France is superior to them all. His grounds for maintaining the superiority of France to England in this respect, are that in France the practical and material, and the intellectual and speculative branches of civilization have always preserved a proper relation to each other, and have, as it were, marched side by side: whereas in England practice has shot ahead of theory; and the physical and economical interests of society have been predominantly cultivated, without a corresponding development being given to the more elevated, refined, and spiritual parts of man's nature. We shall not here stop to inquire whether M. Guizot has furnished correct and sufficient criterions for determining the progress of civilization, or whether he has in his summary comparison of the social and intellectual state of France and England, comprehended all the main elements of the problem: we will only remark, that he has altogether omitted one important consideration in the estimate of the civilization of a country, viz. the progress which it has made in the *use of legal and constitutional forms*, in its habits of self-government, and its capacity for appreciating the application of regular laws, and of carrying them

steadily and quietly into effect. If a comparison is instituted between France and England in this respect, we apprehend that a vast superiority must be conceded to the latter country. The respect for legal forms is sometimes carried so far in England as to be ludicrous, sometimes as to be pernicious; but we esteem it as one of the great safeguards of society, and (while we would do everything to disembarass the law of empty and vexatious technicalities) we should much deprecate any endeavours to diminish the respect so prevalent in this country for legal forms, as such,—a feeling on which the security and peace of the community must mainly rest, in the relaxation of authority which takes place in the inevitable progress of civilized nations to a more and more democratic system of government. In no respect is the inferiority of France to England, as to the capacity of comprehending the utility of legal forms, and the self-restraint which is required for abiding by them, more apparent than in *criminal procedure*: a process which, according to M. Guizot's own admission, requires a high degree of intelligence, and the perfection of which is incompatible with a rude state of society.¹ The late proceedings against Fieschi and his accomplices have afforded a striking instance of the confusion which prevails in a French trial, when the subject is one of unusual interest, and of the manner in which the prisoners, the Court, the witnesses, and the council, perpetually interrupt and address one another. In Fieschi's trial, the guilt of the prisoners was so evident, and they were in themselves of so little importance, that there seems to have been no disposition to press hardly upon them; but in other trials where the evidence is doubtful, and where there is a strong public feeling

¹ Speaking of the ancient Teutonic mode of trial by means of *conjuratoires*, or *compurgatoires*, he says, "La véritable origine des *conjuratoires*, c'est que tout autre moyen de constater les faits était à-peu-près impraticable. Pensez à ce qu'exige une telle recherche, à ce qu'il faut de développement intellectuel et de puissance publique pour le rapprochement et la confrontation des divers genres de preuves, pour recueillir et débattre des témoignages, pour amener seulement les témoins devant les juges et en obtenir la vérité, en présence des accusateurs et des accusés. Rien de tout cela n'était possible dans la société que regissait la loi salique; et ce n'est point par choix ni par aucune combinaison morale, c'est parcequ'on ne savait et ne pouvait mieux faire, qu'on avait recours alors au jugement de Dieu et au serment des parens."—*Hist. de la Civilisation Française*, tom. i. p. 354.

against the criminal, or (what comes to the same) against the crime with which he is charged, the manifest leaning of the Court in favour of the prosecution, and the attempts made on all hands to run down the prisoner, and to overwhelm him with a multitude of irrelevant but stimulating accusations, shock the sense of justice in all persons who either judge by an ideal standard, or who are accustomed to a more calm and equal administration of criminal law.¹ We make these remarks in sorrow, and not in exultation; we hope that the general character of this Journal, and the disposition which we have always shown to diffuse a knowledge of foreign institutions, and to hold up as models those which seemed worthy of imitation, will secure us from the suspicion of seeking by an invidious comparison to disparage France and to glorify England at its expense. We ask for no further confirmation of our assertions than the proceedings which took place last summer at Paris on the celebrated trial, of which we now proceed to detail the particulars.

On the 29th of June 1835, Emile François Guillaume Clément de la Roncière, aged thirty-one years, a lieutenant in the First Regiment of Lancers, was arraigned in the Court of Assize of the Seine, first, "for having in September 1834, attempted to commit a rape on the person of Augustine Marie de Morell; which attempt only failed in producing its effect from circumstances independent of the will of the author." Secondly, "for having at the same time voluntarily inflicted wounds on the person of the said Augustine Marie de Morell, from which wounds resulted an illness which lasted more than twenty days." Samuel Gillieron and Julie Genier were arraigned at the same time as accomplices.

The circumstances of this trial created an intense interest at Paris; more than 4000 applications for seats were made to the President; and the attendance of ladies of distinction was in particular very large throughout the entire proceedings.

The number of facts indirectly connected with the matter in issue, which are disclosed in the act of accusation and in the evidence, is so great, that it will be impossible for us to follow out all the ramifications of the case. We shall, there-

¹ See 8 Law Mag. p. 315; and Eichhorn's *Deutsche Staats- und Rechtsgeschichte*, § 620.

fore, be forced to exclude from our consideration much irrelevant matter, (which ought in fact to have been excluded by the Court,) in order to exhibit fully the statements of the witnesses on the material points of the question.

Emile de la Roncière, son of General de la Roncière, and Lieutenant of the First Regiment of Lancers, was detached from his regiment in 1833, in order to follow the course of the riding school of Saumur, then commanded by General the Baron de Morell. La Roncière appears to have been a man of dissolute and disorderly habits, to have contracted debts which he was unable to pay, to have openly lived with several mistresses, to have committed several breaches of military discipline, and to have undergone several military punishments. All the peculiarities and transgressions of his past life for the thirteen previous years, even to the mode of his entering the army, are carefully collected by the President, and put in the form of interrogatories to the prisoner, accompanied with invidious comments and insinuations, in order to prejudice the jury against him, and to prepare them for condemning him on the main charge without evidence. The following may serve as a specimen of these judicial remarks:—

“ ‘ You used to take your meals at the house of one Marlier? ’—
‘ Yes.’

‘ Did not his wife receive anonymous letters? ’—‘ I do not know.’

‘ Did not you attempt to pay court to his wife? ’—‘ I remained in their house two months and only spoke to her once.’

‘ Did not these anonymous letters, of which it is not difficult to guess the contents, compel Marlier and his wife to leave Saumur? ’—

‘ No, Sir: they left Saumur because their house passed into other hands. I do not owe Marlier a farthing.’ ”

In the beginning of the year 1834 the Baron de Morell was joined at Saumur by his wife, and his daughter, who was sixteen years of age: they were accompanied by Samuel Gillieron, servant, and the *femme de chambre*, Julie Genier, (the two prisoners). Miss Allen, an Englishwoman, the governess of Mlle. de Morell, and Robert de Morell, her brother, aged twelve years, followed soon afterwards.

La Roncière is stated in the act of accusation not to have been invited for some time to the Baron de Morell's parties

on account of his bad conduct. La Roncière denies this, saying, that M. de Morell gave no parties at that period. At any rate, soon after the arrival of Mme. de Morell at Saumur, he was invited one day to dinner, and sat next to Mlle. de Morell; after dinner he is stated to have gone up to her, and showing her the portrait of her mother, to have said, "You have a charming mother; but you are very unfortunate in having so little resemblance to her." This speech is not mentioned in the report of Mlle. de Morell's evidence; but the prisoner, Julie Genier, admits having heard it from her. La Roncière himself strongly denies it, protesting against the absurdity of supposing that a man who had lived in the world could use such language.

At this time began the system of anonymous letters, which occupy so large a part of the proceedings in this singular trial. The first letters were addressed to Mme. de Morell, and contained declarations of love. Others followed to Miss Allen, to the young Robert, and to Mlle. de Morell, full of the grossest insults to the latter. One letter to Mme. de Morell ended thus: "I shall be the whole day near your house. If I see you go out, permit me to think that you will accept the homage of the respectful love of your obedient servant, E. de la R." The general is stated in the act of accusation to have seen La Roncière on the bridge in front of his house, at the time when his wife usually went out; but on the window being opened he went away. This statement, however, is not proved in the evidence.

Another letter, in the same hand, to Mlle. de Morell, signed R., contained these words: "At a future period my hatred will produce results, which will deprive Mary's life of all happiness. Death will be a great benefit to her; for her life will be always miserable and full of torment." These anonymous letters were all found in different parts of M. de Morell's house. La Roncière, when interrogated with respect to the former letter, says, that if he had written such an anonymous letter, he would not have been such a fool as to sign his initials to it; and as to his being on the bridge, he says, that it was the only *promenade* which they had at Saumur. The President sums up his interrogatories to La Roncière on the sub-

ject of these letters with the following remark for the benefit of the jury:—

“The indications in the letters refer so precisely to your habits and your circumstances, *that it is impossible they should not emanate from you!*”

With regard to these anonymous letters, as so much stress is laid upon them, in connexion with the alleged attempt of rape, it is right to observe that M. de Morell received from November 1833, some trifling anonymous letters relative to Miss Allen; and another cautioning him against a political society called the *Société des Bras nus*: he did not preserve these, but thought that the hand had some resemblance to those received at Saumur. It does not appear how *La Roncière* could have had any inducement to write such letters as these: his first concern with the family seems to have been his supposed love for Mme. de Morell, who did not go to Saumur till 1834.

M. Octave d'Estouilly, a half-pay cavalry officer, had come to Saumur in June 1834, in order to perfect himself in the art of drawing. He had been recommended to M. de Morell, had been invited to several of his parties, and (it appears) was well received by his daughter. Similar letters to those received by the Morell family were now addressed to M. d'Estouilly. One received on the 28th of August contained these words: “I wish to disturb your happiness and that of the family of Morell:” a few days afterwards another was sent to him, expressed as follows: “I write to-day to Mary a letter in which I say many humiliating things of her. This letter is signed *D'Estouilly*; I am sure that it will reach her, as I have gained a servant for the price of five francs.” On the receipt of the second letter M. d'Estouilly went to Mme. de Morell, and showed it to her: at the same he learned that the letter alluded to had been received by her daughter. This latter letter, it may be observed, is not produced in evidence. On the 8th of September, d'Estouilly received a third letter, in which were the following passages: “Several things make me presume that you have said everything to M. de Morell. I give you joy of it; it was the best means of tormenting Mary. I have procured some words of her writing

(by my friend). I have attempted to copy them, and I send you the result of my labours. I mend my pen again in order to say soft things to you in the name of the poor unhappy girl. (Pour vous dire des douceurs au nom de la pauvre désolée.)" This letter contained a note to M. d'Estouilly, reproaching him for his coldness, signed *Marie de Morell*: it contained the following expressions: "You are as hard as a rock, and I, who am so tender. I love you so much; you are such a sweet creature (si gentil)." A short time before Mlle. de Morell had written a letter to a friend, which Samuel Gillieron had been charged to put into the post. This letter never arrived. It is suggested on the part of the prosecution that Gillieron gave this letter to La Roncière, who alludes to it in the above words; but no attempt is made to establish by evidence any part of this allegation.

On the 14th of September D'Estouilly received a fourth letter, to the following effect: "Death will be necessary in order to satiate my vengeance; in a short time this young girl will be only a poor degraded creature. If you wish to have her in that state, they will throw her into your arms. I love her to distraction, that is to say, her money, and in my way: I should have wished to turn her head, but her little disdainful manner prevented me from saying it to her. Moreover, I will avenge myself upon her for her love for you."

On Sunday, the 21st of September, M. de Morell gave an evening party, at which La Roncière made his appearance. M. de Morell called La Roncière into the dining room, and in the presence of Captain Jacquemin, requested him, for particular reasons, to leave the house. La Roncière left it without saying a word. The next day he called on Captain Jacquemin, in order to ask for an explanation of what had taken place on the previous evening. M. Jacquemin gave two reasons for his expulsion; one, the language which he had used to Mlle. de Morell; the other, the anonymous letters. La Roncière then consulted another officer, M. Ambert, on the course which he should pursue, who recommended him to bring an action for slander (porter plainte en calomnie), and to demand the verification of the handwritings by *experts*: but La Roncière did not follow this advice. These explanations took place on the 22d; on the night of the 23d the

debts accruing within the liberty of Westminster, is already afforded by the Palace Court, where a competent judge presides, and a regular system of procedure is pursued. (See 10 L. M. 167.)

The case of the Rev. Mr. Rowlatt has been so thoroughly exhausted by the press, that we should merely weary our readers by detailing it. But considering that a promise of the first suitable preferment was conveyed to Mr. Rowlatt at Lord Brougham's desire on the very day he took his seat as Chancellor in November 1830, and that not so much as a make-believe of performance was attempted till he was on the point of leaving office in November 1834, we may fairly make a memorandum of the incident as a striking illustration of Lord Brougham's peculiar notions of benevolence, which exactly coincide with those of Mr. Peter Pounce. "Sir," said Adams, "my definition of charity is a generous disposition to relieve the distressed." "There is something in that definition," answered Peter, "which I like well enough. It is, as you say, a disposition—and does not so much consist in the act as in the disposition to do it." A friend of ours is at present engaged in a dramatic scene on the plan of the third scene in the fifth act of *Richard the Third*, in which Lord Brougham is to be haunted by the ghosts of those who have suffered by confiding in him. It is to be hoped, however, that the earliest opportunity will be taken of compensating Mr. Rowlatt for a disappointment, which, from whatever quarter it fell, was an unmerited one.

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‘ Had she her camisole on ?—‘ No.’

‘ Had she bruises, wounds, and bites ?—‘ Yes, especially on the wrist.’

‘ Were these wounds considerable ?—‘ No, the mark of teeth was visible.’

‘ Did you procure a light ?—‘ No, the moonlight was very bright.’

‘ Did the moon give enough light to enable you to see these bruises and bites ?—‘ It was not by moonlight I saw them : it was by daylight, on the following day.’

‘ Did Mlle. de Morell enter into any details ?—‘ She told me that the man threw himself upon her; that he took off her camisole, that he had pressed her down with force, that he had tied her, and struck her on the arms and legs.’

‘ On the thighs ?—Miss Allen, with a truly English modesty ‘ On the legs.’

‘ Did you make her change her linen ?—‘ No.’

‘ What day did you make her change her linen ?—‘ I do not know ; she did that herself.’

‘ Do you think that the blood which stained her night clothes should be attributed to any other than a natural cause ?—‘ I think so.’

‘ At the moment when you entered the room, did Mlle de Morell name the guilty person ?—‘ She immediately named M. de la Roncière.’

‘ Did she tell you that it was by his face, by his figure, that she had recognized him ?—‘ By every thing.’

‘ Did Mlle. de Morell tell you that the person had said anything ?—‘ She told me that he had said, I come to avenge myself.

‘ What o’clock was it when you replaced her in her bed ?—‘ I placed her in her bed ten minutes afterwards. It was about half-past two in the morning.’

‘ You did not give the alarm : how is that possible ? How, you responsible for this young person ; you, charged with the care of her ; it did not occur to you to cry out immediately, to awake all the house, to call for assistance, in order to secure the person, who must still have been in the house ?—‘ I never thought of that.’

‘ Who prevented you from going to tell Mme. de Morell ?—‘ Mlle. de Morell, who would not remain alone : she would not come with me.’

‘ Did she tell you that she saw M. de la Roncière look at the window laughing ?—‘ Yes.’

‘ Did Mlle. de Morell immediately tell you that she recognized La Roncière ?—‘ Yes.’

'You have not always been so positive?'—'I did not express myself properly.'

'Are Mlle. de Morell's *camisoles* fastened with strings and buttons?'—'Yes.'

'Would it not take some time to undo them?'—'No, for she only fastens the waist-band. I do not know if these strings were burst, but the *camisole* was taken away.'"

The act of accusation states that Miss Allen did not awake M. and Mme. de Morell till daylight at six o'clock. Mme. de Morell, being examined on this point, gives the following evidence.

"What o'clock was it on the 24th of September when you were informed of what had happened?'—'I do not know.'

'Did Miss Allen give you any details on the scene?'—'Yes: she also spoke of a letter left on my daughter's commode. I reproached Miss Allen with having awakened me so late; she answered, that she had been afraid of leaving her alone.'

'But Mlle. de Morell might have gone down to you, and might have made a noise in order to bring you up?'—'Miss Allen was so frightened! I am sure of her attachment.'

* * * * *

'Do you think that the prisoner committed on the person of your daughter acts of brutality and violence, an attempt to murder, or a crime of another nature?'—'I do not know.'

'Nevertheless, did not you attempt to ascertain the truth, either by your eyes, or by questions which you might, which you ought to have put to your daughter?'—'You understand me, M. le President!—Sixteen years: the education which she had received, —every thing imposed a great reserve on me—I respected her youth.'

'But did your daughter tell you what was the act of violence committed on her?'—'She spoke to me of bruises, bites, scratches, (*déchirures*).'

'Did you verify these wounds?'—'Only in one part.'

'In what part of the body?'—'The arm.'

'What was there on the arm?'—'A scratch, a bite.'

'Did not you know that your daughter had received other wounds in another part of the body?'—'I only knew it a fortnight or three weeks afterwards. I saw that she had still something to say to me. She owned to me that she had wished to respect my grief, and not to tell me all the sufferings which she had experienced. She then told me that she had received two wounds in

a certain part of her body; that she did not know if it was with a large or a small knife (*un couteau ou un canif*).'

'At this time did you have recourse to medical men in order to verify these wounds and attend to them?'—'I told Dr. Bécaur, but he did not verify them.'

'Did you verify them yourself?'—'No.'

The only additional proof of the existence of these wounds is contained in the evidence of Mme. Dutrobert, a midwife, and Dr. Lerminier, who examined Mlle. de Morell on the 31st December, just three months after the date of the alleged crime. The midwife states, that she observed a scar three lines in length, and one line in width, and that this scar could only be the result of a wound made with a sharp and pointed instrument. *There was no trace of any other wound.* Dr. Lerminier "declares that he found this part of the body in a natural and normal state; but he observed a scar about three lines in length, which could only have been made with a sharp-pointed instrument; *he only saw one wound*, and he adds, that if others had existed, either internally or externally, he should have perceived them." Dr. Bécaur states, that he saw the marks of a bite on Mlle. de Morell's wrist, and bruises on the arms and breast. Miss Allen is likewise recalled, and is examined on the same subject, as follows:—

"It appears that some leeches were put on Mlle. de Morell a short time after the 24th of September; did you assist in putting them on?'—'Yes.'

'Were you alone?'—'Quite alone: no one but me attended Mlle. de Morell at that time.'

'How was it in putting on these leeches that you did not see Mlle. de Morell's wounds?'—'She put on the leeches herself, under the bed clothes.'

M. Chaix d'Est-Ange. (The prisoner's counsel). 'Where were the leeches placed on Mlle. de Morell?'—'In the part where she had been wounded.'

'I mean in what part of the apartment?'—'In my alcove.'

'Nevertheless, the woman Tessier has declared, that she sponged the floor of Mlle. de Morell, because there was blood from the leeches which had been put on her.'

The President. 'How many leeches were put on Mlle. de Morell?'—'Five, six times, and the last time she put sixteen.'

'It is a difficult matter to put sixteen leeches on oneself and to

stop the blood?"—"I gave her the linen, and she stanchèd and stopped the blood herself." "

It is admitted that Mlle. de Morell did not keep her room after the 24th, and that she went to a ball on the 28th, and danced; but she states that she wore long gloves so as to hide her arms; and her mother says, that she retired with her at eleven o'clock. General Préval is also examined on this point.

" 'I saw (he says) Mlle. de Morell at the ball; she appeared unwell: I thought even that, to disguise her paleness, they had put some rouge on her.'

The President to Mme. de Morell. 'Is that the case?'

Mme. de Morell. 'My poor child was very ill: the pain which she suffered might have driven the blood to her head, but she never put on any rouge.'

The President, to the witness. 'Did Mlle. de Morell dance?'

General Préval. 'Yes, but in the bow which she made me, when I saluted her, I remarked much embarrassment.'

Julie Genier, the *femme de chambre*, one of the prisoners, is also interrogated with regard to this point.

" 'Do you know if Mlle. de Morell went to the ball on the 28th?'—"Yes.'

'Did she dance?'—"Yes.'

'Did she appear unwell?'—"No.'

'You dressed her?'—"Yes, I dressed her and arranged her hair: but I only put on her gown.'

'Did she walk in the room?'—"Yes, and even laughed and joked.' "

The person who broke into Mlle. de Morell's room could have only reached the window by means of a ladder. There is great difficulty on the part of the prosecution in explaining how La Roncière could have effected this, even with the assistance of the servant in the garret. M. Giraud, architect, who examined M. de Morell's house (the time is not stated) makes the following report:—

"The garret above Mlle. de Morell's room is covered with slate, but the state of the slates offers no trace of a cord having been fastened to them; and yet if a cord had been fixt to them, some traces must have remained, as it would have been necessary to make a kind of scaffolding. In a small room adjoining there were

two pins to which cords might have been easily tied; but at the same time these pins showed that nothing had been tied to them, the plaster was not at all altered. With regard to the outside of the house, nothing showed the rubbing of a cord against the wall; and yet if a cord had rubbed against the wall it must inevitably have left marks. The gutter, which came from the top of the house, might have been unfastened, and the cord might have been passed under it; but the gutter had never been moved."

M. Giraud adds, that

"it would have been easy to place a ladder against the wall, and to mount it; but in order to do so with precaution, and to prevent the existence of any mark, it would have been necessary, in order to gain a sufficient rest, to have a ladder thirty feet long, and, also, to have the assistance of two skilful labourers accustomed to the work. Moreover, no trace remained of a ladder having been placed against the wall."

M. Giraud is then asked the following question by a juror.

"'Do you think that under the circumstances of the place a person could have got in by the window?'—'I do not think that it would have been impossible to get in by the window, if the person took the necessary precautions, and if he had sufficient time; but under these circumstances, I think that, especially considering the shortness of the time, it would have been impossible to take the necessary precautions to prevent the escalade from leaving any trace.'

The Attorney-General. 'But during the night?'—'That would have been still more difficult, as more precautions would have been required in order to prevent leaving marks.'

M. Berryer (for the prosecution). 'If a mattress had been stretched on the slates of the entablature (entablement), do you think that then the rope-ladder could have been let down to the window without leaving marks on the slates?'—'I think that the mattress might have prevented marks. However, that would depend on the consistency of the mattress. Nevertheless the slateshowever, this would be possible.'"

It comes out incidentally in the evidence of an officer that La Roncière understood the making of rope-ladders, and had made one for him. This incident, which created a great sensation at the trial, does not seem of much importance.

With regard to the broken window in Mlle. de Morell's room, Jorry, a glazier, is examined. He states, that on the 28th of September he was sent for to General Morell's house,

in order to mend a pane of glass in the dining-room. When he had mended it, the servant told him that there was another pane broken in Mlle. de Morell's room. He went to the room, but she was not visible. He returned on the following day, and mended the pane. It was the first pane at the bottom of the left *battant*. There was a hole in the lower corner of three, four, or five inches in length. The fragments of glass were on the *outer* ledge of the window.

"The President. 'Do you think that it would have been possible to introduce the hand into the hole?'—'Yes.'

'Was the hole sufficiently large to introduce the hand and to open the hasp?'—'I think not.'

'Why?'—'The hand would easily pass, but in order to open the hasp, the whole arm must be inserted; and if the whole arm had been inserted, the rest of the pane must have been driven in, the situation of the hole would have impeded the motion of the arm. It was necessary to open the hasp to raise it; and for this the arm must be still more raised.' "

M. Chaix d'Est-Ange, the prisoner's counsel, remarked, that it appeared from the written deposition of the witness that he had at first declared that the hole made in the pane was too small to admit the hand, and that it was impossible to reach the hasp through it.

Miss Allen is recalled, and examined as follows with respect to the broken window.

" 'Did you sweep Mlle. de Morell's room on the 24th?'—'No, it was not swept at all.'

'Was it not swept before the 29th, the day when the pane was mended by the glazier Jorry?'—'No.'

'Was there any glass in the room?'—'Yes, I swept it up.'

'You did then sweep the room?'—'Yes, I swept up the glass.'

'Where did you put the broken glass; did you carry it away, or put it in the grate?'—'I put it in the grate.'

'How happens it then that the glazier saw the pieces of glass outside, on the ledge of the window?'—'I know that I put them in the grate.'

'Was the hole in the window very large?'—'Yes, very large.'

'Were there still fragments of glass which held to the pane?'—

'There were not many.'

'Was not the hole in the corner furthest removed from the win-

dow-bolt?"—"On the contrary, it was in the corner nearest to the bolt."

"The glazier Jorry has declared the contrary?"—"He is in error."

Miss Allen being requested by the jury to point out on the window in the court how the glass was broken, traced a perpendicular line with her hand on the left side of the lower left-hand pane; she showed that the pane was broken and the glass removed on the whole of that side from top to bottom, up to the wood to which the bolt was fastened, and that it was thus easy to reach the bolt.

The glazier being recalled, pointed out on the same window that the glass was only removed in the lower part of the pane, and that there the fracture made an angle. "You see," he added, that the bolt being fastened to the upright, the left corner of the pane is at some distance from the upright on which the hasp of the bolt is attached."

The statements of these two witnesses are therefore diametrically opposed on this point. It may be added, that Jorry on being asked why he paid particular attention to the extent of the fracture, says, that "when a glazier mends a window he always looks if the pane is half, three-quarters, or a quarter broken. The attention which I paid arises from our always observing if there remain in a broken pane pieces sufficiently large for us to make something by them."

This is the substance of all the evidence bearing directly on the crime charged against the prisoner. La Roncière, indeed, attempts to set up an alibi; but the statements of the witness are not of much importance. The proceedings on the trial, however, bring down the story to a later period, to which we must follow it.

It will be remembered that the person who broke into Mlle. de Morell's room is stated to have left a letter on the commode. This letter was addressed to Mme. de Morell, and was dated "Wednesday, one o'clock in the morning." It ran as follows:—

"You alone will know the true motive of the crime which I am going to commit; it is a very great crime to pollute the purest thing in the world. I have loved and adored you: you have answered me by contempt. I prefer hatred, and I will give you the right to hate me. One day I asked you to go out, and that day

you kept your room. The wretch has had the ill-luck to tell everything to M. de Morell. I have written to him, that wherever I may meet him, I will stamp on his face the seal of infamy. I await him on the ground. All the world at Paris will know your daughter's shame. I leave Saumur, and shall not enjoy your grief."

Consistently with the statement in this anonymous letter, M. d'Estouilly received at nine o'clock on the 24th, by the *petite poste*, a challenge, signed *Emile de la Ron . . .*, and conceived in the following extraordinary terms:—

"You are a scoundrel, a coward. Any one but you, *after all the letters which I have written to you*, would have come to ask me for satisfaction. Instead of that, you have preferred to complain of me to the general. I have been satisfied with Ambert; but as for you, you are no better than a coward. As for the rest, I will one day *stamp the seal of infamy on your face*."

It will be observed, that this letter contains the identical words with respect to M. d'Estouilly which occur in the letter said to have been left in Mlle. de Morell's room on the same morning. It was written in the same hand as the other anonymous letters.

In consequence of this letter d'Estouilly sent a formal challenge to La Roncière, by M. Ambert. Before they went to the ground La Roncière came to explain with d'Estouilly. "I went down into the yard, (says the latter,) I found him pale, overcome, holding my challenge in his hand; he then said to me, half crying, half on his knees, 'that he was innocent of the anonymous letters, that some Satanic spirit had got possession of his writing, and that they wished to play him an infamous trick. Nothing (he added) is easier than to imitate a handwriting: look, M. Ambert, write anything; you will see that I will counterfeit your writing.' " This account of La Roncière's abject behaviour is confirmed by M. Ambert. When they were on the ground La Roncière said, "I must know what I am to fight for." The anonymous letter was then given to him; which he read with difficulty, saying one word for another, so that d'Estouilly at last exclaimed, "Get on faster, and do not pretend that you cannot read." The duel then took place: which ended by d'Estouilly receiving two sword wounds, one in the arm, the other in the thigh.

La Roncière then asked d'Estouilly to forget all that had passed; d'Estouilly refused, saying, that he was convinced that La Roncière was the author of the letters; and adding, that he hoped that a court of law would decide differently from the chance of arms. La Roncière then asked for the letter, in order to lay it before the authorities. This was refused, lest he should destroy it. Matters stood thus till the next day, the 25th, when La Roncière applied to M. Bérail to prevent any further steps from being taken. D'Estouilly insisted on La Roncière admitting that he was the author of the anonymous letters to himself and to the Morell family. La Roncière complained of the hardship of being forced to avow letters which he had not written; and M. Bérail went away. Shortly afterwards, however, he received the following letter, to M. d'Estouilly from La Roncière, which is admitted to be genuine:—

“After the material proofs which exist against me, proofs which would overwhelm me if I appeared in Court, I think that I owe myself to the repose of my family whose honour would be tainted. I disavow all the expressions contained in the letters which you have received, and avowing myself the unhappy author, I offer you my apology for them. Receive it, and be generous enough to be discreet.”

M. d'Estouilly was not satisfied with this apology, and required that La Roncière should admit that he was also the author of the letters received by the Morell family, and that he should immediately quit Saumur. La Roncière submitted to these conditions: he requested M. Bérail to ask for leave of absence for him, and he wrote the following additional letter to M. d'Estouilly:

“I thought that you would be satisfied after my letter of this morning. You overwhelm me with my misfortunes. I declare then that I am the author of the anonymous letters which reached the General, Madame de Morell, and Mademoiselle Marie de Morell. I declare, moreover, that I wrote to Madame de Morell a letter signed *d'Estouilly*, and to you, Sir, another letter, signed *Marie de Morell*. Leave of absence for me has been just applied for, and I quit the school this night.”

M. d'Estouilly made again an attempt to obtain from La Roncière the name of the person who conveyed the letters to M. de Morell's house; but this time La Roncière refused, and in the night of the 25th he left Saumur.

La Roncière, in his interrogatory by the president, gives the following explanation of his reasons for admitting that he was the author of letters which he had not written :

“ ‘ How happens it that you could have avowed yourself the author of these letters, if you werè not in fact? How happens it that in cool blood and with reflexion, after having showed much firmness, you consented to declare yourself guilty of an action of this kind ?’— ‘ I thought myself lost ; it had been affirmed that the experts had declared that these letters were in my writing. I feared to compromise the repose of my poor father. I who have already given him so many causes of complaint, (the prisoner shed tears,) but it was not I who wrote these letters.’

‘ From respect for your father, and from interest for his repose, you ought to have gone in search of him, and not to have declared yourself guilty if you were innocent ?’— ‘ I hoped that my admissions would not be made public, and that in time the real author of the letters would be discovered.’

‘ M. d’Estouilly was not satisfied with the first letter which you wrote him : he required that you should avow yourself the author of all the anonymous letters without exception ; that you should apologize, and you consented ?’— ‘ Yes, I saw myself threatened with legal proceedings : I feared that my first admissions would have only destroyed me, and the considerations which I have mentioned, induced me to write the second letter.’

‘ That was making your position worse. A first admission is followed by another still more incredible ; and *that* when you know that these very anonymous letters were the reason of your being expelled from the general’s house ?’— ‘ I did not know the contents of the letters : I thought that they were unimportant. If I had known that they contained horrors of this kind, do you think that I should ever have consented to own to them ?’

‘ You might have suspected that they were of great importance when they were the cause of your being expelled from the general’s house ?’— ‘ The mere circumstance of their being anonymous was sufficient to warrant the expulsion of a man from a respectable house, whatever their contents might be.’

‘ Your explanations are not the less very extraordinary ?’ ‘ They are conformable to the truth.’

‘ It is maintained on the part of the prosecution that the author of the letters was the author of the nocturnal assault. You have admitted that you were the author of the letters, therefore you are the author of the assault ?’— ‘ I am no more the author of the assault than of the letters.’ ”

The anonymous letters, in M. de Morell's house, whoever was the author of them, did not cease with La Roncière's admission. A letter dated "Wednesday, 4 o'clock in the morning," (the morning of the alleged crime) ran as follows :

"Well, you made a joke of my letters. The catastrophe will prove that I am more formidable than you thought. I must summon up all my hatred in order to have the strength to say to you : Wretched father, I entered into your daughter's room ; I entered, without the assistance of any one, by the window : the noise which I made in breaking the pane awoke her : she threw herself at the bottom of her bed, I threw myself upon her. I almost strangled her with a handkerchief ; the pain made her fall to the ground without consciousness and covered with blood ; I thirsted after her blood and her honour. I had every thing. Having taken the latter from her, after having made her an object of reprobation, I went away without being seen by any one. O what a night ! Behold me ruining a young girl fainting and cold as death !—in the next room a woman was striking her body, as if she would kill herself, against the door, which I had bolted, and was uttering maledictions against me. I had examined the spot on the day that Mme. de Morell went to Palenne, while your daughter was walking with her brother and Miss Allen. By means of a false key I entered the room in order to make all my arrangements ; my first movement was therefore to isolate her from all assistance by shutting the door. Moreover physical suffering deprived her of the power of crying out : now that all is accomplished, now that I cannot but hope that your daughter will have a pledge of her misfortune, (I am convinced of it,) I will tell you that it was Samuel who distributed all the letters at the price of five francs a-piece ; money which I do not wish to claim back from him. I had promised him a thousand francs if he would introduce me into her room by a less dangerous way than the window : he refused. In three days I shall no longer be at Saumur. At Paris you will see your daughter's shame published : here nobody knows it. I fear the attachment and the respect of these Saumurois hogs and of my brother officers, who behave so infamously to me."

Another letter of the same evening of the same day said to Mlle. de Morell.

"You are the most miserable of creatures, and the man who has had the imprudence to stand up for you is half dead : all that for me. A frantic joy possesses me. But there is another thought which I gloat over, that now you are completely dependent on me.

A tie horrible for you will unite us, and in a few months you will be obliged to come on your knees to beg a name for yourself and for another."

Another letter to Mme. de Morell, not dated, but appearing from the contents to be written on the Thursday evening, was signed *E. de la R.*

"I am informed of every thing that passes in your house. The water for the feet, the leeches, said to be for Miss Allen, go their course. They are useless precautions. In truth I had a moment of alarm yesterday. I thought that I had killed her, and my object would have been missed. I should not have repaid you all the ill that you do me. Your daughter will live, but no life will be more horrible than her's."

As this letter contained a direct allusion to an accomplice in the house, and as suspicion had already fallen on Samuel, he was discharged on the 26th. He immediately went to Paris, and put himself in communication with La Roncière. There was now a temporary interruption of the anonymous letters: but on the 12th of October a letter addressed to Mme. de Morell, signed E. R., arrived by the *petite poste*.

"I am in correspondence with some one in your house: you can force me to quit France, but then my anger will pursue you with greater fury. Nevertheless it would be a means of diverting the storm which now threatens you. I would consent to marry your daughter. I feared for a moment that your project was to marry her quickly before the *dénouement*. I have since learnt that there was nothing of the kind. For the rest, I ought to have thought that there are things which a coquettish mother or an avaricious father never do, not even to save their daughter from shame."

On the night of the 21st of October, Mlle. de Morell was found lying on the floor of her room in a state of insensibility, with a note in her hand, signed E. R., to the following effect:

"That which you love the most in the world, your mother, your father, and M. d'Estouilly, will cease to exist in a few months. You have refused me: I will first avenge myself on him."

The crisis brought about by this alarm lasted three days, and was so serious that she received extreme unction.

On the following day, the 22d, M. de Morell received another letter by the *petite poste*.

" I have done nothing more than wound (assassiner) your daughter. I have given her terrible stabs with a knife in certain parts, thinking that if she had told you all that had passed, you would not have failed to think that I had completely enjoyed her. I wished to profit by your error to make sure of a fortune which is very necessary to me. I had the certainty of seeing my propositions accepted with gratitude. I do not even suppose M. de Morell sufficiently avaricious, and you sufficiently coquettish, not to have communicated my proposals to your daughter. She will probably have refused from love of the monster who makes all my enterprises fail. Now vengeance, vengeance, blood, blood: your august protector, M. Gisquet, will not be able to protect you."

In consequence of this letter M. de Morell went to Paris, and caused La Roncière to be arrested. His arrest took place on the 29th of October. On the 28th of November, M. d'Estouilly, who had returned to Picardy, received a letter signed *Victorine Moyert*, and dated Saumur the 26th instant: it contained another letter in the same writing as the anonymous letter, signed *E. de la Ronsiere* (with an s), and dated Paris, the 23d.

" From the depth of my prison I have dared to reckon again on your pity. I conjure you to spare me in your deposition. I entered into Mlle. de Morell's room by the assistance of the servants, with quite a different intention from that of murdering. But in throwing myself on her to prevent her crying out, I wished to make her say that she did not love you. Notwithstanding my blows, she never would answer me a word. In my rage I gave her a terrible stab with a knife. Arrived at Paris, I sent to her *femme de chambre* (of whom I had full possession during my stay at Saumur), a note for Mlle. de Morell, in which I threatened your life. They wrote to me that the mere sight of this paper gave her a brain fever. Burn this letter; it would be very decisive evidence against me, and there is so much! My only means of defence is to deny every thing."

When interrogated by the President, on this letter, La Roncière says, " I must have been mad to have written it; I a prisoner; and instead of being here I ought to be at Bicêtre."

After the alarm on the 21st of October, Mlle. de Morell's complaint had become worse, and her mother had taken her

first to Falaise, whence they went to Paris on the 23d of December. On the evening of that day, between nine and ten o'clock, as the carriage was turning into the street where the General's house was situated, Mlle. de Morell felt some one seize her wrist, which was outside the carriage, so firmly that she cried out "They are breaking my arm." At the same instant she found a ball of paper near her, and she saw a woman who appeared to move away from the carriage. When they arrived, the ball of paper was unrolled; it consisted of two detached leaves, one of which was inscribed "Mme. de Morell,—very important." The contents of the other were as follows:

"The less malicious say, that if you had been a good mother, instead of surrendering your daughter's name to contempt, you ought to have made sacrifices to marry her to her seducer, whom you are pleased to call her assassin. Those who are quite malicious say that the seducer is not the son of a lieutenant-general, but simply your servant: these are the majority. Lastly, the well-disposed say, 'If the assault is real, and if Mme. de Morell has any heart, in less than three months she will marry her daughter in order to silence the shameful calumnies which are in circulation about that poor young person.' This is what they say of you in the modern Babylon."

This appears to have been the last of the long series of anonymous letters. *La Roncière* being now forced to take measures for his defence, began by throwing the blame on Mlle. de Morell herself. He stated that she, her mother, the governess, and M. d'Estouilly had formed a conspiracy to ruin him: that he doubted of the reality of the alleged assault and wounds; and he thought that Mlle. de Morell had, by the intervention of Miss Allen, intrigued with M. d'Estouilly, and invented this story in order to save her honour. He likewise asserted his belief that she was pregnant.

In consequence of this charge, the anonymous letters were submitted to certain *experts*, that is, persons who make it their profession to study and judge of hand-writings. Four of these *experts* are examined on the trial, and they all agree in declaring their belief that the letter signed *Marie de Morell* is in the genuine writing of the party, and that the other letters are in the disguised writing of the same hand. They like-

wise affirm that there is no resemblance between the writing of the anonymous letters and that of La Roncière. The only remarks of the *experts* which seem at all material, are the two following : 1. "The letters attributed to M. La Roncière are written in a hand very superior to his own ; and it is impossible for a man, in order to disguise his writing, to do better than he does habitually. The writing of the anonymous letters is between English and modern writing. It is a free and bold hand." 2. "In the letters written by La Roncière there are many faults of orthography, while in the anonymous letters there are very few." M. d'Estouilly states that when he showed the letter signed "Marie de Morell," to Mme. de Morell, she said "It is certainly my daughter's hand, but her writing slopes more." M. Montgolfier, a paper manufacturer, likewise states that he has compared some of the anonymous letters with the sheet of exercises furnished by Mlle. de Morell as a specimen of her writing, and he finds the two identical : on laying the one sheet upon the other there is not the difference of a hair. Out of fourteen anonymous letters, ten agree with the size of Mlle. de Morell's specimen. Mr. Ambert makes the following statement on this subject :

"The expert has told you that these anonymous letters were written with a light and skilful hand. Well, it is a thing known to the 200 officers who are at Saumur, that M. de la Roncière, although he had never learnt to draw, had great lightness of hand, a great facility, I will not say of imitating writing, for if we had known it we should have driven him from the school, but of copying drawings. It was the time when those little *diableries* in silhouette first appeared. M. de la Roncière passed his life in copying them ; in making those little designs. He had such patience in works of this kind, that he succeeded in making an entire alphabet by interlacing flowers. He had also written his name. He was known for his skill in making transparencies. He made transparencies ; he had the tastes of a woman ; he embroidered ; he made slippers ; he employed himself on works which could not have been executed without that kind of manual dexterity."

Before we finish our extracts from the evidence, it will be proper that we should give some account of the state of Mlle. de Morell's health, both mental and bodily, at the time of the alleged crime, and of her examination. It has

been already stated, that since the 21st of October she had been subject to nervous or epileptic seizures, in consequence of which, at the time of her trial, she passed nearly twenty out of the twenty-four hours in a state of stupor. The medical men who examined her agree, however, in stating that she had perfect possession of her faculties during the intervals of the attacks.

A deposition of a M. Brugnière was read near the end of the trial, when it was too late to examine Mlle. de Morell in relation to it ; otherwise some additional light might perhaps have been thrown on her state of mind. M. de Brugnière, military *sous-intendant* at Saumur, states that near the end of July 1834, he was passing M. de Morell's house at eleven o'clock in the evening, when Mme. de Morell asked him to come in : that she informed him that that day she had been playing on the piano-forte, when a man dressed in plain clothes, but whom she suspected to be an officer, stood under the window, and made enthusiastic exclamations on her singing. At nine o'clock Mlle. de Morell having occasion to go up stairs to fetch some music, returned and told her mother that she had seen the same individual cast away his cloak, and throw himself into the Loire. She added that fortunately some boatmen perceived that he had thrown himself into the water, afforded prompt assistance, and by means of a boat saved him, and stretched him on the shore. On the following day Mme. de Morell sent again for M. Brugnière, and told him that Samuel, the servant, had just brought her a letter, which had been left by a woman. This letter described the scene of the previous day, stated that the writer of it had been led to this act by a passion which he was unable to overcome, and that he regretted that his intention of killing himself had been frustrated. Mme. de Morell thought that this letter was written by one of the officers of the school, but her suspicions did not fall on La Roncière. Seven or eight days afterwards, M. Brugnière was again sent for by Mme. de Morell, who showed him another letter in the same hand, containing fresh declarations of love. The first letter had no signature ; the second was signed with a P. Both these letters were destroyed at M. Brugnière's recommendation. The second of these letters appears, from M. Brugnière's further statement, to be the same as the letter

mentioned above, as containing the proposal to Mme. de Morell to go out at a certain hour, when La Roncière was seen on the bridge. But this statement must be erroneous, as this letter was signed with La Roncière's initials (see above, p. 245). The evidence on this part of the case is very defective: but it is admitted that there is a communication from the *juge d'instruction* at Saumur, which states that the most minute inquiries were made; that all the boatmen were interrogated; all the neighbours questioned; and that no trace of such an event could be found. The prisoner's counsel adds, that it is the custom to give a reward for saving a man from drowning, and that no such reward was claimed. No explanation is offered on the part of the prosecution.

After the speeches of counsel, of which we have no space to give any account¹, and the summing up of the president, the jury having remained six hours and ten minutes in deliberation, found, by a majority of more than seven voices, that La Roncière was guilty of an attempt to commit a rape on the person of Marie de Morell, which only failed of success from circumstances independent of his will; and that he wilfully inflicted wounds on the said Marie de Morell, which did not produce an illness of more than twenty days. They also found by the same majority that there were attenuating circumstances in favour of the accused. The other two prisoners were acquitted.

The court then sentenced La Roncière to ten years imprisonment (*réclusion*).

It is difficult to understand on what principle the jury found La Roncière guilty and acquitted Samuel: the anonymous correspondence, if they believed it to be La Roncière's, implicated him very deeply, and it does not appear how La Roncière could by possibility have got into Mlle. de Morell's room without the assistance of some one in the garret, and if this assistance was given, every thing points to Samuel.

We are still less able to conceive what were the *attenuating*

¹ MM. Berryer and Barrot supported the prosecution with extraordinary power. During M. Berryer's speech (which is ill reported) General Morell was by his side. M. Berryer described the atrocity of the crime and the frantic grief of the parents with great eloquence, and then pointing to the general, who was sitting there in a kind of vacant stupor, he added, "Et ce malheureux père, il est là—il est là à côté de moi, mais il ne m'entend pas, quand je vous raconte ce qu'il a souffert." This sally was much applauded.

circumstances in La Roncière's conduct. It seems to us that this is a case in which there is no medium: either the evidence is not sufficient to convict La Roncière, or, if it is sufficient, his conduct is attended with almost every species of aggravation. The verdict of the jury looks as if they wished to amend a defect in the evidence by recommending the prisoner to mercy: whereas they ought either to have acquitted him altogether, or (if such a course were allowable) to have recommended that he should be punished with the utmost severity which the law would permit.

It is far from our intention to say that the jury were mistaken in finding a verdict of guilty against La Roncière: not only a fuller and more correct report of the trial than we have been able to procure, but a much closer and more scrutinizing examination of the witnesses would be required before any person could be justified in pronouncing with confidence on the question. La Roncière is indicted for two offences; first, for an attempt at rape; and secondly, for stabbing and wounding. Now this is precisely that part of the case which is left in the greatest obscurity. Mlle. de Morell is the only person who could speak to the former offence; and, from the extraordinary system adopted in her examination of sparing her feelings and assuming that the charge is true, without her testimony, we are left in entire uncertainty as to the extent of the violence alleged to have been committed upon her. Miss Allen gives her evidence in so prevaricating and equivocal a manner, that it is difficult to judge how much credit it deserves: but her account of the state in which she found Mlle. de Morell when she entered the room, merely goes to prove that an assault had been committed on her. With regard to the wounds, Mlle. de Morell on the trial, in answer to a leading question of the president, states that he struck her more than once with a sharp pointed instrument: Miss Allen is stated to have known of these wounds immediately, but never to have seen them, although Mlle. de Morell put on leeches six times; and the mother, according to her statement, did not hear of them till nearly a fortnight afterwards, when she was informed of them by her daughter: although it would have been natural to ascertain why her daughter used so many leeches, and although an anonymous letter written on the day after the alleged assault expresses a fear that the party had

killed her, which (one should think) would have induced any mother but Mme. de Morell to make some further inquiries into her daughter's case. The result of the evidence on this point is, that Mlle. de Morell states that she received *wounds* in the plural number, (she had previously told her family that she had received two stabs,) which neither her attendant nor her mother saw: and that three months afterwards she was examined by a midwife and a medical man, who reported that she was a virgin, and that there was *one* small scar, but no trace of a second. It is needless to say that, for all these persons knew, the scar in question might have existed ever since Marie de Morell was in her cradle.

The disturbance of body and mind under which Mlle. de Morell laboured at the time of the trial, passing four-fifths of the day in a state of trance; and the hallucinations to which, from the strange and unexplained story about the drowning man, she would appear to have been subject, render it extremely important that some decisive corroboration of her story should come from a disinterested witness. Now it is singular enough that in the material points all corroboration fails her. Her story about the wounds is not confirmed even by Miss Allen and her mother,¹ and the medical man only finds the mark of one small scar: there is no alarm given at the time, when it would be the natural, nay, one would think, the almost irresistible impulse, to awaken the entire house, and the more so as, according to her own account, she was *not* ravished: the glazier says that the window-bolt could not be reached through the hole in the pane, and that the broken glass was on the *outside*: the architect can find no trace of a rope-ladder having been let down from above, and can only conceive it barely possible that a person could have got into the window without leaving some trace. It may be that La Roncière scaled the house without leaving any mark; that the glazier is mistaken, and confounds different panes of glass; that the young lady and her governess were at the same time too much frightened and too prudent to give the alarm; and that of two wounds one only left a scar. All these things are possible; but it is an unfortunate feature in the case for

¹ We hear that one of the suggestions is, that Miss Allen was in league with La Roncière, and that she admitted him into Mlle. de Morell's room. But nothing in the evidence points to this connexion.

the prosecution that their chief witness comes in a state of mind bordering at least on insanity to tell a marvellous story, which had been hushed up for some months, and that she receives no confirmation, but rather the reverse, in the few points in which her account admits of being verified. On the whole we think that few juries would have ventured to convict on the evidence of Mlle. de Morell and her governess, unsupported as it is in various material points, without the additional proof derived from the anonymous letters.

These anonymous letters form a very important, but very enigmatical part of the case. In the report of the trial they are stated in so very imperfect and garbled a manner, that a reader cannot arrive at any satisfactory conclusion respecting them. Scarcely anything is said in the evidence as to the places where those which did not arrive by the post were found : the dates moreover are not clearly given ; and they are not set out at length in the act of accusation, but only extracts are given.

One of the most singular features about them is that they are only *half-anonymous* ; they are written, it is true, in a disguised hand, but most of them (and those the most dangerous) are signed with La Roncière's initials ; and one is signed with his entire name, but misspelt. It seems the act of a madman to write such letters : and La Roncière may well say that if he had signed his name to such documents, he ought to be not in a prison but in a madhouse. On the other hand it is difficult to understand what motive a man could have had for acknowledging himself the writer of letters of which he knew nothing, after he had fought a duel on account of them, and had thus given all the satisfaction which a man could be required to give, even if he had been guilty. La Roncière indeed says that he was informed that the *experts* had declared them to be in his writing ; and it is certainly true that when a person of low morality and bad character is charged with an offence, we are not to conclude that he is guilty because he tells a falsehood in order to clear himself. The first impulse of such persons, when they get into a scrape, usually is to attempt to extricate themselves from it by a lie. There is also some force in La Roncière's remark, that if he had known the contents of the letters to the Morell family, he never would have owned himself the

author of them. But it is to be observed, on the other hand, that as no public notice had been taken of the attack on Mlle. de Morell, La Roncière, if he was the author both of the assault and the letters, might have fancied a few days afterwards that the family intended to hush up the matter, and feared to complain lest their daughter's reputation might be injured. It is likewise singular that though La Roncière had acknowledged himself the author of the anonymous letters, they still continued to arrive, and in the same hand. Moreover it must be allowed that if La Roncière's object was to marry Mlle. de Morell for her fortune, the mode which he adopted, of insulting her and writing half-anonymous declarations of love to her mother, was singularly ill adapted to the purpose. La Roncière's deliberate and written admission must, however, be considered as weighing heavily against him, though it is not conclusive.

The other hypothesis is that Mlle. de Morell was herself the author of these letters, or at least privy to the writing of them. We must begin by saying that we attach no weight whatever to the judgment of the *experts* founded on the comparison of the hand-writings: evidence of this kind is known to be so delusive as not even to be admissible according to our law. M. Odilon Barrot's exposure of these gentlemen is quite decisive: "Notwithstanding (he truly says) the erudite mixture of anatomy and metaphysics in the evidence of the *experts*, the science of the verification of hand-writings is not the less a vain science; and we may say of these professors what the Romans said of their augurs, that it is marvellous how they can look one another in the face without laughing." The agreement in the size of the paper is a singular coincidence, but it may be a mere accident. The main objection to this explanation is, however, the absence of any apparent motive for such conduct on the part of Mlle. de Morell. La Roncière alleged that the story was invented in order to serve as a cloak for a criminal intrigue with d'Estouilly; but it appeared that Mlle. de Morell was a virgin, nor did she allege that her person had been violated. It seems incredible that the rest of the family could have been concerned in the conspiracy; they would not have shown such reluctance to divulge the affair and to accuse La Roncière, if they had themselves invented the story in order to ruin him. It seems under the circum-

stances impossible to suggest any interest which Mlle. de Morell could have had in inventing such a story against herself, if she was of sound mind ; and if she was not, it must be confessed that there was much reason in her madness to enable her to carry on so complicated a system of deceit. There is also considerable force in the argument so ably urged by M. Barrot, as to the profligate and reckless tone perceptible in the letters, far more consistent with the character of the confirmed libertine, than of an inexperienced girl of 16.

The Morell family certainly create a strong impression against themselves by the discreditable manner in which they give their evidence, by their want of frankness, and their manifest unwillingness to give a full account of the transaction. Their imperfect and oracular revelations leave the case in an uncertainty which we are unable to remove; that they would have thrown more light on the subject, if they had been further pressed by the court, or if they could have been cross-examined by the prisoner's counsel, we do not doubt: but as we cannot conjecture what they would have said if they had been properly examined, we must leave our readers to solve the enigma for themselves as they best may.

The speeches of counsel, considered as acute reasonings on imperfect evidence, as well as eloquent and impassioned declamations, are deserving of great attention: M. Odilon Barrot's and M. Berryer's are said to have been nearly their happiest efforts.

Many traits illustrative of national manners and character occur in the evidence, which our space has not enabled us to notice: we will only add some examples of the proneness to duelling and to suicide which seems so unhappily prevalent in France.

Colonel St. Victor, second in command of the school of Saumur, states in evidence: "When I heard from the mouth of M. de Morell that M. de la Roncière had entered into his daughter's room, I exclaimed, What! you have not killed him: you, my friend, my fellow-soldier, whom I have always seen so brave on the field of battle, who in your military career have given so many brilliant proofs of resolution and firmness? Was it for me, he answered, to divulge this horrible calamity?"

M. de Schlaincourt, a retired cavalry officer, and a relation of La Roncière, says: "In the beginning of October last the prisoner came to me, and told me that he had admitted being the author of anonymous letters which he had not written. Struck with astonishment, I placed my purse and a pistol on the table, saying, that if he was not innocent, he had only one or the other of these means to choose: the purse to escape out of the country, or a pistol to terminate a miserable existence."

At the end of an abridged edition of La Roncière's trial, published at Brussels, is a short laudatory notice of General la Roncière, the father of the prisoner, apparently copied from some French newspaper. Among other praiseworthy actions, the following is recounted :

"General La Roncière had been for a short time commander of the cavalry model school at St. Germain, when he heard that two scholars fifteen years of age had just had a dispute, and that one of them had received a box on the ear. He sent for them and said: 'Gentlemen, you have had an angry quarrel, one of you has even received a blow. You will be one day officers; but you would be unworthy to bear an epaulette if you did not settle this affair with arms. You will each take a pistol, place yourselves at fifteen paces, and at each miss you will advance a step.' *At the eighth fire the two youths had each a ball in the belly.*"

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ART. II.—LORD JOHN RUSSELL'S BILL FOR REGISTRATION OF BIRTHS, MARRIAGES AND DEATHS.

EVERY measure of improvement must, in this our free country, pass patiently through the several grades of established process before it will be consummated by legislative sanction. The people must require it before parliament will effect it; the proposal may be philosophically just, and capable of clear demonstration, but that is no guarantee for its immediate adoption; for the majority of the people are not philosophers, and yet the majority of them must first learn its merits, and then set the machinery of legislation in motion. This process of instruction is tedious and laborious, but it

is the almost necessary consequence of our free institutions. Parliament cannot safely advance in front of public opinion. Some theorist suggests the idea of an improvement; a treatise is published, read, and for a while forgotten; then the periodicals, quarterly, monthly, weekly and daily, apply themselves to the subject, discuss it bit by bit, and repeat it over and over again; the public become gradually conscious of it, and symptoms occur to manifest their prevalent wishes. Some independent member then moots it in parliament; he asks leave to bring in a bill, and brings it in accordingly, but without any expectation of its being at that time carried; the arguments in favour of it are rehearsed—a debate ensues—but little is said against it, save that “it is an important matter, and parliament ought to pause before they suddenly consent to so great an alteration.” This seems prudent, and it accordingly stands over for further consideration; and then, if the suggestion be really of such intrinsic merit as to remain sound and uninjured after the application of these ordeals, in the course of another session or two government kindly takes up the subject which is thus ready for their patronage; they adopt the principle and modify the details, pass the act, and really accomplish a great advantage for the nation, though they only give the last polish and affix the maker's mark to a work, which had previously been put together for them by a multitude of hands.

The Registration of Births, Marriages and Deaths has now arrived at this last stage. Two years ago it was introduced into parliament by Mr. Wm. Brougham—it is now again brought forward by Lord John Russell; it is right in itself, and now comes out of the right custody, and we may therefore expect soon to see it the law of the land.

Lord John Russell's Bill is based upon that of Mr. Wm. Brougham, being in *pari materiâ*; it was necessary that it should be so: it includes, however, important alterations in the general features of the measure, and many minor alterations in the details, and we are glad to have arrived at the conviction, that these alterations are chiefly improvements.

It may be in the recollection of some of our readers, that, in our twenty-fifth number (Aug. 1834), we entered into a full discussion of Mr. Wm. Brougham's Bill on this subject; some

of our suggestions are, we perceive, met by various clauses of the present Bill, whilst others are still left open for discussion. As the measure now assumes a character of greater practical probability, we may perhaps be excused if we take occasion, in some few instances, to repeat and enforce our former remarks.

In our previous article we brought together extracts from the evidence of six practising lawyers before the Select Committee of the House of Commons, in order to establish from their unanimous testimony, that the present parish registers are incomplete and insecure—that they prove little—that they prove that little badly—that they sometimes tend to disprove that which is the fact—and that they produce uncertainty of title, which leads to expensive litigation. To these extracts we beg again to refer our readers, because they contain, in a short space, a body of facts, which, to those who have not minutely examined the subject, will appear surprising, and the inference from which will, in our humble judgment, be irresistible. We alluded, moreover, to the whole body of evidence given before the Committee, from one barrister, five solicitors, six clergymen, four gentlemen of antiquarian and scientific attainments, one deputy-registrar of a diocese, four parish clerks, a Jew, a Quaker, a director of the Brussell's Observatory, a member of the Herald's College, and an actuary of the National Debt Office, asserting that the best representatives of each diversity of opinion had therefore been examined, and that they *all* agreed in declaring that the present system is defective, and requires considerable amendment. The Report of the Committee, the unanimous result of the above examination, concluded with a “decided opinion, that a new national system of Registration should be attempted.”

Having thus ascertained the necessity for amendment, we proceeded to inquire *in what mode* the amendment should be effected? This led us into the history of parish registers from their first introduction by ecclesiastical authority in the reign of Henry VIII.—the parliamentary establishment of a *civil* register of *births*, marriages and burials, during the Protectorate—the return, at the Restoration, to the ecclesiastical registration of *baptisms*, marriages and burials—and the subsequent inefficient acts of parliament which have been passed to regulate the keeping of parish registers, down to the Bill

introduced by Mr. Wm. Brougham. In attempting to judge of the applicability of that Bill, we considered—1st. The machinery of the Bill, and how the several parts of that machinery would act with respect to each other; and, 2dly. How the information was to be obtained which was to set that machinery in motion.

Whether this be a good arrangement or not, we will, for the sake of convenience, continue it.

For all that preliminary matter which leads us down to the present measure, we must be allowed to refer to the evidence and arguments embodied in our former article, and must assume it to have been there proved, as summed up in the concluding paragraph, that “the radical defect of the present parish registers is, that they are records of ecclesiastical rites, which happen only incidentally and collaterally to suggest probable presumption as to facts of great civil importance, this presumption being always uncertain, often delusive, and in no way arising with respect to a great part of the population.”

We are anxious, however, to clear the subject from one general objection which we did not previously encounter. We considered this question quite independent of party politics, and we consider it so now. We regard it as we would any improvement in medical science, in agriculture, or in manufactures; and we believe that those who judge of it with any political bias or sectarian jealousy, do not really understand it. It has, however, been argued, that this is a measure at least useless, perhaps inimical, to members of the Church of England, and useful only to those who dissent from its communion. We hope it is merely the mistake of those who make the assertion, as it is the delusion of those who believe it. It is, at all events, not the fact; and that it is not the fact, must be manifest to those who have in the slightest degree examined the subject. A birth and a death are occurrences by which certain parties acquire legal rights and property; they are as necessary links in the chain of title as any deed or will that is preserved in the muniment room; and yet, carefully as we hoard up the latter, we have nothing better than hearsay evidence of the former. We allow the important fact to pass without taking any authentic note of it; and years afterwards, when, from the intervening time, witnesses may be

dead or memories may be defective, we then begin to search for evidence. We begin this search, also, when the very circumstance has occurred which makes the proof necessary. If ascertained and registered at the time of its occurrence, fraud could not intrude, because it could not then have had an object; but we collect evidence with an avowed object, and when, therefore, every temptation exists to forge what cannot be found.

In this predicament the Churchman is at present placed as well as the Dissenter. The former wants to know when and where his ancestor was *born*; he may, it is true, discover the register of his ancestor's *baptism*, but you might as well refer him to the register of his ancestor's *burial*; one would answer the purpose as well as the other, or rather one would be as little to the purpose as the other. Baptism comes after birth and so does burial, but *how long after*? Is there any uniform rule in either case; and if not, how can the date of baptism prove the date of birth? Baptism may, and we know does occur, at uncertain intervals after birth,—even on the day of marriage, or a few days previous to death,—and helps us, therefore, very little in ascertaining the exact period of birth. Of this material fact, so important to the secure possession of property, none of us, whether baptized at church or chapel, or not baptized at all, possess any adequate proof. It is, therefore, not for the benefit of any particular class of religionists, but in a national point of view, and for the benefit of all classes, essential to establish immediate, accurate, and lasting proof of those events which determine legal rights, in order to the security of title and the decrease of litigation. For exactly the same, and with no further or stronger reason, has the legislature thought it prudent long ago to require that a transfer of landed estate should be in writing, and the bequest of it be, moreover, attested by a certain number of witnesses. Time was when, for the purpose of supplying evidence of the fact, deeds and wills were made in the presence of the assembled parishioners, and minuted or registered by their clergyman. When deeds and wills came, in process of time, to be authenticated in a more convenient manner, we know not that the clergy of those times did or could complain of any invasion of their accustomed rights and privileges. Nor

now, when we at last wish to obtain similar authentic proof of other equally important events,—when, for certain civil purposes, we would establish a civil register of births, marriages and deaths, we cannot perceive that they have any other reason to complain than had their predecessors in the ministry, when deeds and wills ceased to be proclaimed in church or chapel. Let it, however, be clearly understood, that there is no intention to disturb the present ecclesiastical registration of baptisms and burials, or the fees now usually received by the clergy for performing the ecclesiastical rite of baptism, marriage, or burial, the last section of Lord John Russell's Bill expressly providing, “ that nothing herein contained shall affect the registration of baptisms or burials as now by law established, or the right of any officiating minister to receive the fees now usually paid for the performance or registration of any baptism, burial, or marriage.” The loss to the clergy, from the establishment of a civil register of births, marriages and deaths, will be this,—that no one will in future pay them for certificated extracts of presumptive evidence, when he can from another source obtain the positive and conclusive evidence he requires to authenticate his title. And this is really a matter more for the consideration of parish clerks than of parish clergymen; and if the evidence, to which we have before referred, be correct, these gentlemen have not been so very exact in the entry or custody of registers, as to entitle them either to encomium or confidence. The truth is, it was not their main business—they had other, and more important matters, to attend to—it came only incidentally and occasionally in their way—and they bestowed but a very casual and uncertain attention upon it.

Trusting we have sufficiently shown the importance to all religious classes in the country of obtaining a civil register of births, marriages and deaths, we will endeavour to examine the details of Lord John Russell's Bill.

Mr. Wm. Brougham's Bill entrusted the care and management of the register, and the controul of the officers employed about it, to the Commissioners of Stamps, whilst that of his lordship gives the same authority to the Poor Law Commissioners. This difference arises out of another more practically important. Mr. Wm. Brougham made the Collectors of As-

sessed Taxes the registrars, whilst Lord John Russell points to the relieving officers in each union as the proper persons to be employed in the registration. We cannot perceive the expediency of employing either one or the other of these parties. We suggested, in our former remarks on Mr. Wm. Brougham's Bill, "whether it might not be more desirable that the local registrar should be chosen by the rate-payers in vestry assembled?" and we are now confirmed in that opinion. By the present Bill of Lord John Russell, in each parish or township separately maintaining its own poor, and in which no board of guardians shall have been established under the Poor Law Amendment Act, the rate-payers in vestry assembled have the general power to elect *one or more fit persons* to be the registrar or registrars of such parish or township, subject to the approval of the Poor Law Commissioners, or of the registrar-general, if there should be no commissioners; whilst, in those unions or parishes in which a board of guardians shall have been established, the guardians are authorized to appoint such and so many as they may think fit of the relieving officers, or other persons properly qualified in the judgment of the Poor Law Commissioners, or of the registrar-general, if there should be no commissioners, to be the registrars of that district. In this latter case, the guardians might pass over the relieving officers, and appoint "other persons properly qualified," if they saw fit to do so; and we presume, that, if a general power of election were confided to them, circumscribed by no recommendation, they might still appoint their own relieving officer, whenever it appeared to them convenient and becoming so to employ him. We do not, therefore, perceive the use of this *congé d'elire* in favour of the relieving officer, and think it would be much more preferable to leave the election of the registrars entirely open either to the rate-payers or the guardians, subject to approval at head-quarters. We do not quite relish the idea of mixing up the duties of registrar with the relief of the poor—we wish to see the machinery of registration so arranged as to *invite* people, as much as possible, to come forward and supply the requisite information to the registrar; and perhaps the relieving officer may be considered rather a repulsive than an enticing character. Moreover, in large towns and populous districts, there would be sufficient

employment for the registrar to be wholly occupied in discharging the duties of that office, as remarked in our previous article:—"In country parishes the rate-payers or guardians would frequently be disposed to appoint the resident clergyman, there the most competent person for the situation, whilst he might be equally disposed to obtain a small increase of his limited income by the performance of its duties."

Mr. Wm. Brougham's Bill made the Surveyors of Taxes the superintendent-registrars of districts. By Lord John Russell's Bill, in those unions and parishes in which a board of guardians exists, the guardians are to appoint their clerk or auditor, or other person properly qualified in the judgment of the Poor Law Commissioners, to be a superintendent-registrar; and, as to other parishes not united and not under the management of guardians, the Court of Quarter Sessions are to appoint a sufficient number of fit persons to be superintendent-registrars. We think the latter mode of appointment should be universally adopted. As the clauses of the Bill at present stand, each union or parish, under the government of a board of guardians, will be of itself a district for a superintendant-registrar; but of all other parishes and townships not united, and in which there is no board of guardians, the Poor Law Commissioners will send a list to every clerk of the peace, and the Court of Quarter Sessions will then divide those parishes and townships into suitable districts, and appoint a superintendant-registrar for each district. There may be motives of convenience for dividing parishes into districts for different superintendent-registrars, quite independent of their division or union, for the purposes of parochial relief, and we fancy the division would be best left to the discretion of the local magistrates. Neither can we distinguish any sufficient reason for committing to the commissioners of either stamps or poor laws the general care and controul of the new system of registration. Both sets of commissioners have already sufficient business of a totally different character to occupy their attention, which ought not to be divided between stamps and registration or poor laws and registration. If such authority were entrusted to them, the probability is, and certainly the most convenient arrangement would be, that one of those commissioners should occupy himself with the controul of the registration. If an

efficient registrar-general and deputy-registrar be appointed, we see no use in distracting the attention of any commissioners from their own peculiar duties to attend to the affairs of registration. Let the rate-payers in vestry assembled, or the guardians, appoint the registrars, subject to the approval of the registrar-general; the magistrates in borough sessions appoint a superintendent-registrar for each borough; and the magistrates in the county sessions divide the other parishes into suitable districts, and appoint a superintendent-registrar for each, subject, in both the latter instances, to similar approval; and let the registrar-general be directly responsible for his conduct to the Home Secretary. If the registrar-general be fit for his situation, he would be the most proper person to have the controul and regulation of his own department.

The Home Secretary of State, or the Poor Law Commissioners with his approbation, are by the present Bill to make regulations for the management of the register-office, and the duties of all its officers. With just as much reason might the Poor Law Commissioners be authorized to make regulations for the management of the Post Office. If the registrar-general understands the duties of the office to which he is appointed, he is surely, under the approval of the Home Secretary, the person best qualified to frame its regulations, and from time to time to modify them, as his own practical experience of their operation may suggest.

By the present Bill his Majesty, or in reality the Home Secretary, will appoint the registrar-general, and the Poor Law Commissioners, or, if there should be no Poor Law Commissioners, the registrar-general will appoint a sufficient number of clerks, officers and servants for the metropolitan register-office, at such salaries as the lords of the Treasury may deem fit. We have already objected to the introduction of the Poor Law Commissioners into the affair of registration, and this arrangement furnishes us with an additional objection. It is surely best, and most conducive to efficiency, that the patronage, and the power of expulsion, should reside immediately in those who have the actual superintendence. Let the Home Secretary appoint the registrar-general and a deputy-registrar, the latter being added in consideration of the additional responsibility we propose to throw upon the former, and

let the registrar-general be empowered to appoint the clerks and servants of his own metropolitan office; the lords of the Treasury, as before-mentioned, fixing their respective salaries. We do not hesitate to admit that the introduction of the Poor Law Commissioners is preferable to that of the Commissioners of Stamps, but we are strongly of opinion, that, if the former be left to the uninterrupted discharge of their own peculiar duties, and the registrar-general be armed with authority and strengthened in the manner we have mentioned, the machinery of registration at head-quarters will be more efficient and less liable to get out of order, because more simple, and the responsibility attached to it will be more direct and single.

By Lord John Russell's Bill, the guardians of an union or parish are authorized "to provide and uphold, *out of the monies coming to their hands as such guardians*, a district register-office" for the superintendent-registrar of the district, and the court of quarter sessions is subsequently authorized "to provide and appoint a fit and secure place for the custody of the registers while in the keeping of the superintendent-registrars whom they may appoint." There is here an evident verbal inaccuracy, and the two clauses should be expressed in corresponding language; at least, the magistrates should have authority to uphold as well as to provide, and it should be directed *out of what monies* the disbursement should be made by them. As the clause stands at present, the expenditure ordered by the court of quarter-sessions would, we presume, be defrayed out of the county-rate, but if so, the rate-payers in unions or parishes in which there was a board of guardians would be doubly taxed; 1st, directly and wholly for their own district register-office; and 2dly, for their proportion to the county-rate out of which the other district offices would be erected. If our previous suggestion were acted upon, and the court of quarter-sessions for boroughs and counties respectively, were in every instance empowered to appoint the superintendent-registrars, and to erect and maintain their district offices, the best plan would probably be for the court to allot the expense between the different parishes and townships within each district, in the proportion of their several contributions for the time being to

the county-rate, and to make an order accordingly upon the overseers of each place.

As to marriages, the registrars do not appear *by this Register Act* to be called upon to interfere in their registration. The registrar-general will furnish to "the rector, vicar, or curate of every church and chapel in England wherein marriages may be lawfully solemnized," (which can refer only to clergy of the church of England,) "and also to the properly authenticated registering officers among the Quakers and the Jews, a sufficient number in duplicate of marriage register books and forms for certified copies thereof, and each officiating minister, or register officer of the two denominations specified, must, immediately after the solemnization of the marriage, register in duplicate in two of the marriage register books the several particulars relating to that marriage, according to the form given. Then every such officiating minister and registering officer, must quarterly send to the superintendent-register of the district in which such marriages were solemnized, a copy of all the entries of marriages made by him during the previous quarter, and must send one of his register-books, when filled, to the same superintendent-registrar, and deposit the other original register-book in the public chest of the parish, the Quakers and Jews keeping the duplicate register-books in their own custody. The above, therefore, will be the regulations with respect to marriages in the church of England, and amongst Jews and Quakers, and indeed with respect to all marriages, so long as the marriage law remains unaltered. But by the Marriage Act, prepared and brought in at the same time by Lord John Russell, (of which we notice only those parts affecting registration,) provision is made both for the legal solemnization and due registration of other marriages. Chapels may be registered for the celebration of marriage, on a certificate from twenty householders at the least, that it has been used by them during one year as their principal place of religious worship; instead of the publication of banns, twenty-one days' notice of the intended marriage is to be given to the registrar, who is to copy the notices into a book, which will be at all reasonable times open to public inspection, and marriages may be celebrated in such registered buildings in the presence

of the registrar and witnesses; the registrar is forthwith to enter every marriage so celebrated in his presence in a marriage register-book, according to the form prescribed, the entry whereof must be signed by the minister, the registrar, the parties married, and the witnesses, and the registrar is to forward these marriage register-books to the superintendent registrar of the district, in the same manner as he is directed to deal with the register-books of births and deaths. Thus by the two distinct modes of procedure above explained, each parish church will continue to retain an original register of all the marriages there celebrated, and the Quakers and Jews will also have in their own possession an original register of their respective marriages. In the superintendent-registrar's office for each district will be a register of *all* the marriages celebrated in that district, at church, chapel, or elsewhere; and registers of all marriages in the kingdom will also find their way to the metropolitan office. We conceive these regulations of the Marriage Bill, are an improvement upon those contained in Mr. W. Brougham's former bill, wherein every officiating person was himself to enter the register of each marriage solemnized by him in two books, one of which he was to deliver to the minister of the parish in which the marriage had been solemnized, and the other to the superintendent-registrar of the district, which would in each parish have produced a multiplicity of marriage register-books. The objection is also avoided which we formerly urged against the provisions of Mr. W. Brougham's Bill, viz. to which minister should those dissenting clergymen deliver their books who are removed to different stations at yearly or other intervals, and whose books might probably therefore be filled with marriages in half a dozen parishes?

Substantially following the provisions of Mr. W. Brougham's Bill, the registrar is directed to register the requisite particulars respecting all births and deaths within his own district in a register-book of births and a register-book of deaths; he is quarterly to transmit to the superintendent-registrar a certified copy of the entries made during the preceding quarter, all which certified copies the superintendent-registrar is to examine and verify, and forward them quarterly to the metropolitan office, and the registrars are also to send their super-

intendent-registrars the register-books of births and deaths when filled, to remain in the district offices of the latter.

The registrar-general will cause indexes of the registers to be prepared in the metropolitan office, but we yet see no provision made for preparation of indexes of names in the district offices. We formerly suggested that searches would be greatly facilitated if in each parish an index of *names*, referring to the page of entry in the register-books, were prepared in each district after the lapse of each ten years or some other defined period, and we still think the idea deserving of attention.

We observe that the scale of allowance to the registrars for the first five entries in each register-book of births and deaths is lowered from 5*s.* to 2*s.* 6*d.* each, making it now 2*s.* 6*d.* for each of the first twenty entries, and 1*s.* for each of the remainder—the former proposed allowance of 5*s.* for each of the first ten entries was surely no very exorbitant pay.

Searches may be made, and certified copies obtained, either at the metropolitan office or of the several parties having possession of the registers in the different districts. At the metropolitan you may search for *all* marriages, births and deaths occurring in any part of the kingdom, from the establishment of the register-office down to a period never exceeding half a year immediately previous to the search. In the district-office of each superintendent you may search for *all* marriages, births and deaths, occurring in that district within the same limits of time. For the very recent registers of the current quarter, application must be made to the several registrars. In each parish church, moreover, may be found the registers of marriages solemnized there, and the registering-officers of the Quakers and Jews will also have the registers of marriages solemnized amongst their own body.

The tabular forms of registering births, marriages and deaths, are, we observe, exact transcripts of those given in Mr. W. Brougham's Bill, upon which we formerly ventured to suggest a few amendments. We will not now repeat the forms at full length which we then took the liberty of suggesting, (they may be found in the Article to which we have before referred,) but we may perhaps be permitted to repeat the reasons we urged for the various alterations then recom-

mended, and which we still consider desirable. In all the forms the eye would be assisted in searching if the *surname* were written *first* in the first column. In entries of births and deaths the sex would be sufficiently apparent from the name, and might be omitted. In the entry of a birth, the name and maiden name of the mother, and the place and time of the parents' marriage, will serve to determine the identity of the party, and facilitate the completion of a connected pedigree; with the same view we would insert the "abode" of the father as well as his "rank or profession," because, under the provisions of the Bill, the birth must always be registered in the parish in which the child is born, though that may often happen not to be the parish in which the father usually resides. The *abode* should also be added to the "rank or description" in the entries of deaths and marriages. In these, also, more complete information would perhaps be supplied, if, instead of a reference to the place "where born," the inquiry were, in case of marriage, "where born, or where previously married, if married before, and when;" by these means, all the circumstances affecting each individual would be disclosed on the register in a more connected manner, each entry referring immediately to the last entry made respecting the same person. This may seem to be more complicated, but would not, we think, present much difficulty in practice, the place of marriage being as easily ascertained as that of birth, and the matter might be greatly facilitated if every person registering a birth or marriage were directed at the time to give a certificated copy of the entry to the parties, as the practice would then in a short time become general, of producing the certificate of the last entry when the next occasion arose for registration. It should also be borne in mind, that these references are not legal evidence of the facts to which they allude, but merely guides to the inquirer. The form for the entry of deaths does not include any column for specifying the disease, accident, or other *cause of death*; yet it is stated in the evidence of several of the most able witnesses, and indeed is sufficiently apparent, that this would be of very great value, especially to medical science—it would denote the different complaints prevailing or decreasing throughout the country at different periods—

what particular complaints distinct parts of the country might be more or less liable to or exempt from—what complaints prevailed in the different ranks and occupations of life compared with each other—and hence it might be inferred what were the general moral or licentious habits at each period, or in each district, or of each occupation, and what soil or situation or other local circumstances might engender or discourage any disease—in fine, the specification of the causes of death might in a few years establish important statistical and medical conclusions, at which we have at present no possible means of arriving: we would, therefore, add a column for the cause of death.

How, then, is the information to be obtained? The enactments and directions of Lord John Russell's Bill correspond in this respect very closely with those of Mr. W. Brougham. By sect. 18, the registrar must inform himself carefully of every birth and death happening in his district, and learn and register the particulars required, as soon after the event as conveniently may be done. By sect. 19, the occupier of every house, in which any birth or death shall happen, shall, within eight days after such birth, or within three days after such death (three days in both instances in Mr. W. Brougham's Bill), give notice thereof to the registrar of the district; in the case of a new-born child found exposed, the overseers of the poor, and in the case of a dead body being found, the coroner, (instead of the person finding the child or body, as in Mr. W. Brougham's Bill,) shall forthwith give notice thereof to the registrar, and of the place where the child or dead body was found, and a penalty of 20s. is inflicted for neglecting to give any such notice. Mr. W. Brougham made this penalty 10l.; if that were too much, this perhaps may be thought rather too little. By sect. 20, the father or mother of every child, or in case of their death, illness, absence or inability, the occupier of the house in which such child shall be born (omitting the "guardian or next friend" of the child, and being thus more simple and clear,) must, within fifteen days after birth, give information, upon being requested so to do, to the said registrar, according to the best of his or her knowledge and belief, of the particulars required to be registered touching the birth. By sect. 25, the next of kin or

other person present or attending at the time of death, or in case of the death, illness, inability, or default of such persons, the occupier of the house in which such death shall have happened shall, within eight days, (fourteen in Mr. W. Brougham's Bill,) give information, upon being requested by the registrar, of the particulars required to be registered. By sect. 27, the registrar shall deliver gratis to the person having charge of a funeral, a certificate that the death has been registered, which shall be delivered to the minister or person officiating in the religious burial service, *or to the person by whose authority the grave or vault shall be dug or opened for the burial of the body* (the last words in italics being now first added in the present Bill); and a person performing any funeral, or religious burial service, *or authorizing a grave or vault to be dug or opened for the purpose of burial*, without having received such certificate, shall forfeit 50*l.* The giving a false statement is made perjury, and by sect. 38; if any registrar shall refuse, or, without reasonable cause, omit to register any birth or death, *of which he shall have had due notice as aforesaid*, he shall forfeit 50*l.*

It will be found, on comparison, that these regulations vary in some slight particulars (a few of which we have noticed) from the corresponding clauses of Mr. W. Brougham's Bill; several of the remarks, however, which we formerly made upon them will still apply. We cannot perceive the force of that general direction given to the registrar *to inform himself* of every birth and death in his district, because he is not made amenable for any neglect until *after due notice* of the birth or death shall have been given him by the proper parties. If, from the very general nature of the instructions in sect. 18, it be intended that the registrar should exercise some little diligence in searching out for births or deaths of which no notice may have been sent to him, that duty should be exacted and enforced in some explicit and intelligible manner; if that be not intended, then it should appear plainly that he is not obliged to act until he receive notice. Our former remark, that it was not clear whether the registrar was bound to depend entirely upon and confine himself to the information of the parents and other parties enumerated, or whether he might also refer to others for information, either corroborative

or contradictory of that first received, appears to be shut out by the 28th section of the present Bill, enacting that no register of a birth or death shall be given in evidence which shall not be signed by some person professing to be the informant, *and to be such party as is by the Bill required to give such information to the registrar.*

We still consider it a very important omission that the registrar is not directed to *see* the child, which he should always do. In France, where a civil and compulsory registration has long existed, been well-managed, and given general satisfaction, the parents are required within three days *to produce the child to the mayor* of the commune, who registers its birth; this is a great check upon fraud, for the registrar cannot, if he see the child, be much deceived respecting its age, and as the Bill sends him to the parents for information, the duty of seeing the child would be scarcely any additional trouble. As to deaths, it may be even more important that the registrar should, as in France, have ocular inspection of the dead body, though this might not be so necessary if information respecting deaths were obtained from the medical attendant. The *causes of death*, the insertion of which in the register we have recommended, might, we conceive, be readily ascertained, either if the medical attendant of every party deceased were at once required to send to the registrar a certificate of the cause of death, or if the registrar were directed to inquire amongst other particulars the name of the medical attendant, and to send him a form of certificate to be filled up and returned immediately, in consideration of which, all physicians and surgeons should be yearly, on their application at the district register-office, presented with the entire result in the shape of an analytical digest, prepared at the metropolitan office according to the most approved method, showing the relative proportion of the different causes of death in different parts of the country, and amongst the different classes of society.

In Mr. W. Brougham's Bill it was directed that births should not be registered at all if the information were not furnished within fourteen days; now, however, by the present bill, if the birth be not registered within fifteen days, any person present at the birth may, within six months, procure

its registration, by producing the child before the registrar and superintendent-registrar of the district, and declaring the particulars on oath or affirmation; for this, of course, extra fees will be payable, and after six months the birth cannot be legally registered. It is not, however, explained how the registrar is to act on receiving notice of a new-born child being found; all the particulars required in the form of registration cannot of course be known; we presume a name should be given it, the age stated according to appearance, and a special entry made of the circumstances. Neither is the registrar instructed how to proceed in the event of his discovering, after the expiration of eight days, that a body has been buried without any notice to him, and of course without any certificate from him. As the bill stands at present, no death can be registered if the information be not furnished within eight days.

The 24th section provides, as the bill of 1834 did, for the case of a child being baptized by a name different from that in which it was registered. A certificate of such baptism is to be given by the minister and delivered by the parent or guardian (under a penalty of 5*l.*) to the registrar, who is to add an entry thereof to the child's previous register. But as extra fees will have to be paid for the certificate and additional entry in the register, it will be more usual, because more economical, to baptize by the registered name.

There is a power of rectifying errors in the register, provided it be done within *one* month, and in the presence of the parties interested, or in case of their death or absence, in the presence of the superintendent-registrar and two other witnesses.

One omission, which we before noticed, is now supplied, viz. the register of the death of any of his Majesty's subjects occurring *at sea*. By the 26th section, the surgeon, in such a case, or in default thereof, the captain or commanding officer of the vessel on board of which the death has happened, shall forthwith certify the particulars required to be registered, as far as they are known, and the name of the vessel, and on its arrival in any port in the United Kingdom, or by any other sooner opportunity, send the certificate through the post-office to the registrar-general. Attention having, it appears, been given

to this part of the subject, we are the more surprised to observe that the bill does not yet include any provisions for registering all the births, marriages and deaths occurring in the army and navy on foreign service, or generally among his Majesty's subjects in foreign countries. We hope that such clauses may yet be added to the bill.

Having now somewhat minutely examined the provisions of Lord John Russell's Bill, both in its simple character of an improvement of our laws, and also with reference to the previous Bill of Mr. W. Brougham on the same subject, we need not repeat our general concurrence in its object, and we sincerely trust that it may in its progress through parliament receive that consideration which its importance requires, and all those amendments of which it is susceptible.

G.

ART. III.—LIFE OF SIR WILLIAM BLACKSTONE.

AMONG those who have risen to eminence by the profession of the law, none have obtained a more extended and durable reputation than Sir William Blackstone. The eloquence of the advocate only charms his cotemporaries, and he is no more remembered when no more heard; the wisdom of judges of the past time lies hid in voluminous reports, and is known only to the initiated; but the fame of the Commentaries is universal—they are at the present day as highly esteemed as when first published—they are studied by every one who wishes to become a lawyer—they are read by every one who considers it interesting to be acquainted with the political institutions or civil regulations of his country. The labours of Blackstone make smooth and pleasant the entrance of the student into the dry and intricate system of technical law,

“and charm

His painful steps o'er the burnt soil.”

Of him then, to whom every lawyer is under so great obligations, it cannot be uninteresting to know the life.

William Blackstone was born on the 10th of July, 1723, in Cheapside. He was a posthumous son; his father, Mr. Charles Blackstone, a silkman by trade, having died some months

before his birth. This his biographer and brother-in-law, Mr. Clitherow, deems a providential circumstance, although apparently a misfortune. "For," says he, "had his father lived, it is most likely that the third son of a London tradesman, not of great affluence, would have been bred up in the same line of life, and those parts, which have so much signalized the possessor of them, would have been lost in a warehouse, or behind a counter." His mother belonged to a family of some consideration; she was the daughter of Lovelace Bigg, Esq. of Chilton Foliot, in Wiltshire. On her being left a widow, her relations took charge of the education of her children. The two eldest lads, Charles and Henry, were taken by their uncle Dr. Bigg, Warden of Winchester School; they afterwards both became Fellows of New College, Oxford, and obtained livings. Another uncle, Mr. Thomas Bigg, a surgeon in Newgate Street, provided for the subject of the present memoir. When seven years old, he was sent to the Charter-House, and, in 1735, was admitted on the foundation, one of his mother's cousins having procured the nomination of Sir Robert Walpole.

Here his proficiency was so great, that he soon became the favourite of the masters, and, at the age of sixteen, was at the head of the school. About this time he first displayed his literary abilities by some verses on Milton, for which he was rewarded with Mr. Benson's gold medal. Although but young, he was thought sufficiently forward to be removed to the university; and accordingly, on the 30th Nov. 1738, he was entered a commoner of Pembroke College, Oxford,— "a society," says Johnson, himself a member, "which for half a century has been celebrated for poetry and elegant literature." He was here cotemporary with Shenstone, and More, afterwards Archbishop of Canterbury. Master Blackstone, however, did not proceed to the university immediately, but was allowed to remain at school until after the 12th of December, the anniversary commemoration of the foundation of the Charter-House, in order that he might speak the customary oration in honour of Richard Sutton, which he had been at the pains to prepare.

Such was his merit, or such his interest, (for he who was nominated by Walpole must have had some interest,) that he

obtained two exhibitions, to one of which he was elected by the governors of Charter-House, to the other by the fellows of Pembroke College.

He seems, from the first, to have made up his mind to follow the profession of the law, being doubtless prompted by that desire of distinction, which his success at school had served to stimulate, for we find that he entered himself a member of the Middle Temple on the 20th of Nov. 1741 (being then eighteen); nor did he lose any time in qualifying himself for practice, but was called to the bar so soon as the probationary period of five years had expired, viz. on the 28th of Nov. 1746.

Previously to this, he had removed from Pembroke to All Souls; and, in June, 1744, become a fellow of the latter college. All Souls was no less celebrated for lawyers than Pembroke was for literati; he himself mentions Lord Northington and Chief Justice Willes as fellows of this society, and (space permitting) it might be pleasing to speculate on the influence which this association with literature and law had upon Blackstone—

“ When first the college rolls receive his name,
The young enthusiast quits his ease for fame;
Through all his veins the fever of renown
Spreads from the strong contagion of the gown.”

In June, 1745, he graduated Bachelor of Civil Law. Upon obtaining a fellowship, and a consequent improvement of his revenue, he took chambers in the Temple, and divided his time between London and Oxford.

At Oxford he had diligently progressed in the study of the classics, mathematics, &c.; and, before he was twenty, had compiled a Treatise on the Elements of Architecture, illustrated by plans and drawings from his own pen, which, however, he did not publish. An eminent architect of the present day, to whom, a few years' since, the work was referred for an opinion upon its merits, after criticising minutely that portion of it which related to the more ornamental part of the art, expressed his astonishment that any person not intended for the profession, should have entered so elaborately, and reasoned so justly, upon what is generally supposed the least fascinating division of the study, viz. the different modes

of construction of buildings, the various preparatory mechanical contrivances, the soil best suited for foundations, and other of the laborious minutiae of that scientific art. He devoted, too, no inconsiderable portion of his time to the fascinations of politer literature, and had become accomplished in the art of poetry. But, upon betaking himself to read the law, he deemed it necessary to abandon this pleasing employment. To do this required no little resolution, and he has embodied his regretful feelings in some elegant lines, which were afterwards printed in Dodsley's *Miscellanies*. These verses display a cultivated taste, and an intimate acquaintance with our most admired poets, to whose writings we may trace several coincidences. To his early predilection for poetry, we may reasonably attribute the formation of that exquisite style and method with which he afterwards embellished and illustrated the law. For nothing so well can teach us that propriety of expression, that felicity of illustration, and that symmetry of method, by which the most abstruse subject may be rendered clear and delightful, as the study of the works of those who may be stiled the masters of language. He, who would convey information, must learn to please, otherwise he may pour forth stores of knowledge without much improving his hearers; and the art of poetry is nothing more than the art of pleasing by a combination of words and images. Almost every lawyer, who has risen to any enviable eminence, if not, like Blackstone, a poet himself, has, nevertheless, so far indulged a partiality for the belles lettres, as to have been the friend of poets and the associate of wits. Mansfield, Cowper, Harcourt, Talbot and Stowell are names which immediately occur to us. The *vingti annorum lucubrationes*, which, according to computation, are required to form a perfect lawyer, may, without danger, be interspersed with lighter and more miscellaneous studies, in the same manner as we may dine on a variety of dishes without injury, nay, even with advantage to our health. The student requires not to be encouraged in relaxing pursuits; it may, however, console him to know, that they are not inconsistent with his duty.

Notwithstanding this relinquishment of the delightful employment of his youth, we find that Blackstone had one relapse. This was on the occasion of the death of Frederick

Prince of Wales in 1751, when, at the instance of his brother-in-law, he composed an elegy, which appeared in the Oxford Collection. He cared not, however, to be again caught toying with the muse, and therefore exacted from his relative a promise of secrecy, which that pious person presumed not to violate until after Sir William's death.

Whether his expectations of success at the bar were humble or high, it may be conjectured, without much hazard, that they were disappointed. In fact, from 1746 to 1760, he only reports himself to have been engaged in two cases, and those so unimportant, that they are not mentioned in any other book. But we are told that, at this period, he became acquainted with several of the most eminent men of the legal profession, who saw, through the then intervening cloud, that genius which afterwards burst forth with so much splendour. From the time of his call to the bar until Michaelmas Term, 1750, he appears to have regularly attended the Court of King's Bench, and taken notes of cases. In these, however, we may perceive a gradual relaxation of diligence, symptomatic of hope deferred; and latterly, the only cases are those concerning the universities, in whose affairs Blackstone always took an especial interest.

In his farewell to his muse, he thus salutes his profession:—

“ Then welcome business, welcome strife,
Welcome the cares and thorns of life,
The visage wan, the pore-blind sight,
The toil by day, the lamp by night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling hall,
For thee, fair justice, welcome all.”

The contemplation of justice alone was inadequate to reconcile him to these things, or to keep him in London, where, we are told, his expenditure exceeded his receipts.

More prudent than Cortes, who, when he landed in Mexico, burned his ships to render retreat impossible, he did not abandon his fellowship as he had done his poetry, nor did he cease to cultivate his Oxford connections. On the contrary, he passed much of his time in that city, and engaged himself actively in university affairs. He was elected Bursar of his college; and, in May, 1749, was so lucky as to obtain the ap-

pointment of Steward of the College Manors, and also to be elected Recorder of Wallingford, on the resignation of his uncle. In 1750 he took his degree of Doctor in Civil Law, and thereby became a member of the convocation.

About this time the College of All Souls were troubled by the numerous claims of those who were related to Archbishop Chichele, the founder, by which they were prevented from electing learned and ingenious individuals into their society. This gave occasion to Blackstone's first publication—"An Essay on Collateral Consanguinity." By this pamphlet he endeavoured to prove, that as the Archbishop, by the canons of the Roman Church, could have no legitimate lineal descendants, the great lapse of time had extinguished collateral consanguinity, and that all mankind might be presumed equally akin to the founder. This doctrine was rather ingenious than convincing; and when, in 1762, the college, acting on it, rejected the claim of one of the founder's kinsmen, who appealed to Archbishop Secker as Visitor, the archbishop, with a common law judge and a civilian as his assessors, decided in favour of the appellant, notwithstanding the argument of Blackstone, who was of counsel for the college. Afterwards, when raised to the bench, he was chosen by Archbishop Cornwallis as one of his assessors, and assisted in framing a regulation which did away with the inconvenience to the college, without much violating the intention of the founder.

Although his hopes of advancement at Westminster Hall had been disappointed, and although he had sufficient employment at Oxford to make his time pass without tedium, and sufficient revenue to free him from anxiety, he was not deterred from attempting

"Things unattempted yet in prose or rhyme."

He formed the design of reducing into system the common law, which had hitherto lain in scattered fragments in the reports, or in large masses in the Institutes of Coke, "*rudis indigestaque moles*"—of treating with elegance a subject on which the graces of composition had never before been bestowed—of teaching in a place, where it had never before been taught, a science which no one there desired to learn. With the dignity of a doctorship, the convivial society of a college, a respectable reputation and an easy income, he persevered in

his Herculean undertaking, and completed his plan. With every inducement to indolence, he was not idle—with none of the ordinary motives of exertion, he worked—

“Fame is the spur that the clear spirit doth raise
(That last infirmity of noble mind)
To scorn delight, and live laborious days.”

Too much praise cannot be bestowed upon Blackstone for having resisted all those temptations which have seduced so many men of promise, and which are, perhaps, harder to be overcome than any other of the difficulties that beset us in life. Too much gratitude cannot be paid to him by lawyers for his gratuitous and invaluable present to his profession. It should be recollected, too, that he was not fluent in speech, and it may be inferred that his pen was not that of a ready writer. The composition of every sentence was probably an effort of mind; and although his labour in collecting the materials for his work must have been incalculable, it cost him more pains to mould them into form. In confirmation of this we may mention, that, although a temperate man, he made use of the excitement of wine to quicken the operations of his mind, and that he composed the Commentaries with an inkstand on one side and a bottle of port on the other.

It was most likely after Michaelmas Term, 1750, when he grew weary of

“The drowsy Bench and babbling Hall,”

that he began to prepare his lectures upon the laws of England, which formed the basis of the Commentaries. In Michaelmas Term, 1753, he delivered his first course at Oxford. What with the novelty of the undertaking and his own reputation at the University he obtained a very numerous class, and many of the first men attended. In fact, his lectures became quite popular, perhaps as much from their strangeness as their excellence, and all the idlers of the University flocked to hear Dr. Blackstone lecture on the law. It is related of him, that during all the time he delivered these lectures he never kept his audience waiting even a few minutes. It is some evidence that he had a considerable number of disciples, that in the next year, 1754, he published his Analysis of the Laws of England, as a guide to those who attended his lectures.

His fame had by this time extended itself beyond the narrow precincts of Oxford, and his abilities had gained him the esteem of more discerning judges than the under-graduates of the University. Thus, when in the year 1752, the chair of civil law fell vacant, the Duke of Newcastle consulted Murray, the solicitor-general, as to the person on whom to confer the appointment. The solicitor-general strongly recommended Dr. Blackstone. The duke, with characteristic caution, desired to see the candidate, in order that he might himself form an opinion as to whether he was qualified in every respect for the office. Dr. Blackstone was accordingly introduced. "I presume," said his grace, "in the event of any political agitations in the University, that your exertions may be relied upon in behalf of the government." "Your grace may be assured that I will discharge my duty in giving law lectures to the best of my poor ability." "And your duty in the other branch too?" inquired the duke. The doctor bowed. A few days afterwards Dr. Jenner was appointed Regius Professor of Civil Law.

In this year, Dr. Blackstone was engaged as counsel in the strongly contested election for the county of Oxford. This gave occasion to his "*Considerations on Copyholders*," which, at the instance of his client, Sir Charles Mordaunt, he published. Sir Charles, however, did not rely on the ingenuity of Blackstone to unravel this Gordian knot, but adroitly solved the difficulty by an act of parliament.

He was now assessor in the Vice-Chancellor's Court, and one of the delegates of the Clarendon Press, which he much improved, and otherwise employed himself to the advantage of the University.

In 1756 he resumed his attendance at Westminster, and he appears from this time until 1759 to have come up to town every winter and shown himself in court each Michaelmas and Hilary Term, for the purpose, doubtless, of making himself known. He does not record that he was engaged in any cause.

Mr. Viner having bequeathed a large sum of money, and a larger abridgement of law, to the University of Oxford, for the purpose of instituting a professorship of common law, it became necessary to appoint a professor. All eyes were turned towards Dr. Blackstone, as the most fit person for that office,

and he was, accordingly, on the 20th Oct. 1758 unanimously elected first Vinerian Professor. He lost no time in entering upon the duties of his professorship, and on the 25th of the same month delivered his Introductory Lecture on the Study of the Law, now prefixed to the Commentaries, which for elegance of composition is perhaps not excelled by any thing in the language.

His Lectures soon became so celebrated that he was requested to read them to the Prince of Wales, (afterwards George the Third,) but being at that time engaged with a numerous class of pupils at Oxford, whom he did not think it right to leave, he declined the honour. However, he transmitted copies for the prince's perusal, and his royal highness, far from being offended, sent the doctor a handsome present in acknowledgement of his worth.

Thinking that he had now established a reputation from which he might reasonably hope for advancement, he resigned his employments of assessor in the Vice-Chancellor's Court, and steward of All Souls' Manors, and in June 1759 purchased chambers in the Temple, where he came to reside; only visiting Oxford at the periods required by the duties of his professorship. This time, his hopes being better founded, were realized; although we do not find that he appeared in court in any case of importance until Trinity Term 1760; nor, indeed, does it seem that he ever acquired much celebrity as an advocate. His name does not occur in the reports anything like so frequently as those of Norton, Morton, and Dunning, &c., yet doubtless he obtained a considerable share of practice as a chamber counsel; and the opinion of one, who it was known had so thoroughly investigated the laws, must have been valuable and much sought after.

Lord Chief Justice Willes and Justice Bathurst invited him to take the coif. This he declined, not being ambitious of that ancient and honourable degree, or thinking that the expense more than counterbalanced the honour and privileges acquired thereby. So that now, instead of sitting in briefless despondency on the back benches, he actually had judges soliciting him to plead in their courts.

This year he published his edition of *Magna Charta* and a tract on the Law of Descents. The former work occasioned a short controversy between him and Dr. Lyttleton, Dean of

Exeter (afterwards Bishop of Carlisle). The dean had furnished Dr. Blackstone with an ancient roll containing both the Great Charter and the Charter of the Forest, of which the doctor made no use, not deeming it original. The dean was angry that the authenticity of this family property (it belonged to his brother, Lord Lyttleton) should be doubted; he therefore exhibited his roll to the Society of Antiquaries, who returned him thanks, and decided in his favour. Out of respect to that learned body, of which he was now (May 1762) a member, Dr. Blackstone presented a memoir in support of his view of the question. The chief point in dispute between the dean and the doctor, was whether the great seal had ever been appended to this roll. The dean asserted that most indubitably it had, from the fact of some threads remaining by which another piece of parchment had evidently been attached. The doctor contended that it was only the commencement of an old copy of statutes, and that the threads had probably connected it with other parchments containing the continuation, and proved, moreover, that it was not usual to attach the royal seal to a charter on a separate piece of parchment. He also furnished the society with a description of an antique seal, in a letter to the Hon. Daines Barrington, which letter contains a very graphic account of the dispute between the prelates and popular party in the reign of James the First, with respect to ecclesiastical jurisdiction. It is printed in the third volume of the *Archæologia*.

The first cause of any interest which he was entrusted to argue was that of *Robinson v. Bland*, in Trinity Term 1760. The point in dispute was, whether a gaming debt, contracted in France, could be recovered in this country. Blackstone had to contend that it could not. His argument, if we may trust his own report, was elaborate and ingenious. The following passage is extracted as a specimen :

“It is suggested that this is a positive law—that there is no vice in the contract—no moral turpitude in fair gaming. But is there any in stock-jobbing, in insuring the exportation of wool, in a marriage-contract, or in suing out an original after six years are expired? Yet no transaction of this kind will be countenanced in our courts, whether the cause of action arose at home or abroad. It is not a necessary ingredient to vitiate a foreign transaction, that it must be accompanied with moral turpitude. Reasons of foreign

or domestic policy will make it frequently improper to enforce a contract against the positive law of the state.

"But is there no degree of moral turpitude in excessive gaming, such as risking 700*l.* at a sitting? There is at least extravagance, and probably distress to a man's self, his family, and dependents in every relation of life. Gaming to excess gives a loose to a every furious passion that deforms the human mind. What this excess is the laws have ascertained. In gentlemen, by stat. Car. II., it was 100*l.* at a sitting; by 9 Ann. it is 10*l.*; in tradesmen, by the Bankrupt Laws, it is 5*l.*

"This Court will not give a sanction to this fashionable vice, nor suffer our travelling nobility and gentry to fall a more easy prey to it than they are already. If they lose only ready money in France, our laws indeed cannot assist them: but the loss is then limited, and the consequence less pernicious. But gaming on trust is big with ruin, which in its nature cannot be computed."

In the next cause in which he appears to have been engaged, the question argued was, in a legal point of view, decidedly the most interesting that ever came before the courts of this country. It was as to the common law right of literary property. The action was brought by the sons and executors of the celebrated Jacob Tonson against one Collins, for pirating their copyright in the *Spectator*. The case was first argued in Trinity Term 1761, by Wedderburn for the Tonsons, and Thurlow for Collins, and again in Michaelmas Term following by Blackstone on the one side and Yates on the other. Of Blackstone's admirable argument we must content ourselves with giving the following passages, and doubt not but that they will tempt our readers to refer to his Reports, where the perusal of the entire debate will afford both instruction and delight:

"The Roman Law of Accession (hinted at in the former argument) was founded on very absurd principles. If one wrote a poem on another man's paper, the poem belonged to the owner of the paper, and not to the poet. Surely a satisfaction for the paper was all that the owner was entitled to. The same law, in the same breath, gives testimony of its own unreasonableness. If a picture be painted upon my tablet, it belongs to the painter. For it is ridiculous (says the emperor) that the painting of an Apelles or a Parrhasius should follow the property of a worthless board. Certainly there is as little reason that the works of a Bacon or a Milton should become the property of the stationer, upon whose paper

they might casually be written. But, absurd as this law is, it is not absurd enough to say, that the owner of the paper acquired any more than a right to that identical copy. It never supposed, that he acquired a right to the sentiment, so as to multiply copies. For this being the usual way of rewarding the labour of an author, it would be unjust to make him a sharer in the reward who has been no sharer in the labour. It is the only species of property whereof authors are usually possessed; and it would be doubly hard to take from them their only means of subsistence.

"Printing is no other than an art of speedily transcribing. What, therefore, holds with respect to manuscripts, is equally true of printing. If an author has an exclusive property in his own composition, while it is in the mind,—when clothed in words,—when reduced to writing;—he still retains the sole right of multiplying the copies, when it is committed to the press. The purchaser of each individual volume has a right over that which he has purchased; but no right to make new books, and gain perhaps 500*l.* at the original expense of only 5*s.*

"This answers Mr. Thurlow's question concerning the extent of the present remedy. 'Does it lie against the keepers of circulating libraries, who buy one book and lend it to a hundred to read?' Certainly not. The purchaser of a single book may make any use he pleases of it; but no man, without leave from the author, has the right of making new books, by multiplying copies of the old. If a man has an opera-ticket, he may lend it to as many friends as he pleases; but he may not counterfeit the impression, and forge others. The owner of a single guinea may barter it, or lend it, as he pleases, but he may not copy the die and coin another.

"It is necessary to sift this right to the bottom, and to argue upon principles, as it probably will be a leading precedent; and it is more satisfactory, first to convince by reason, than merely to silence by authority."

In his reply he thus ably distinguishes between literary productions and mechanical inventions:

"Style and sentiment are the essentials of a literary composition. These alone constitute its identity. The paper and print are merely accidents, which serve as vehicles to convey that style and sentiment to a distance. Every duplicate therefore of a work, whether ten or ten thousand, if it convey the same style and sentiment, is the same identical work which was produced by the author's invention and labour. But the duplicate of a mechanic engine is, at best, but a resemblance of the other, and a resemblance never can be the same identical thing. It must be composed of different

materials, and will be more or less perfect in the workmanship. Although, therefore, the inventor of a machine may not be injured at common law, by the sale of a work made like his, it will not follow, that an author is not injured by the surreptitious sale of a work that is absolutely and specifically his own. The proprietors of the *Spectator* were not injured by the sale of the *Rambler*, which resembled their composition; but we say, they are now injured by the sale of the *Spectator* itself.

“There is a distinction, then, in the nature of the things compared together; and there is also a distinction arising from public convenience. Mechanical inventions tend to the improvement of arts and manufactures, which employ the bulk of the people; therefore they ought to be cheap and numerous; every man should be at liberty to copy and imitate them at pleasure; which may tend to further improvements. However, a temporary privilege may be indulged to the inventor for a limited time, by the positive act of the state, by way of reward for his ingenuity. This inconvenience will soon be over, and then the world will remain at its natural liberty. But as to science, the case is different. That can, and ought to be, only the employment of a few. And one printing-house will furnish more books than any nation can find able readers; which differs it still more from the case of mechanics, of which very few in comparison can be constructed, under the inspection of the author.”

This last sentiment is not exactly in accordance with the spirit of the present times, or the principles of the Society for the Diffusion of Useful Knowledge.

This case, which was the first in which the common law right of literary property was mooted, is only reported by Blackstone. Although the judges were of opinion for the plaintiff, it was adjourned, on account of its importance, into the Exchequer Chamber. It was then discovered that the defendant was merely nominal, and that all the expenses were paid by the Tonsons; in consequence of which the judges refused to give judgment. Blackstone afterwards argued in support of the same side of the question in *Millar v. Taylor*; and when, in 1774, the conclusive case of *Donaldson v. Beckett* came before the House of Lords, he showed by his judicial opinion that he had argued from conviction.

In 1761 the appointment of Chief Justice of the Common Pleas for Ireland was offered to him, which he declined. In March of the same year he was returned to parliament for

Hindon, in Wiltshire, and on the 6th of May following was gratified with a Patent of Precedence. The day before this he was married to the daughter of James Clitherow, Esq. of Boston House, in the County of Middlesex, the then representative of an old family in that county, and grandfather of the present possessor. Honours and happiness thus flowed in thick upon him.

By his marriage he vacated his fellowship, yet was he not a loser, for the Earl of Westmoreland, the Chancellor of the University, in the July following appointed him Principal of New Inn Hall. This not only gave him an additional dignity in the University, but afforded him an agreeable residence when he went there to deliver his lectures. He had it in contemplation to make New Inn Hall a society for students of the common law, by annexing the Vinerian Professorship to the Principality, and constituting Mr. Viner's fellows and scholars members of that Hall. But this plan was not approved by the Convocation.

His presence at Oxford was so much desired, or his professorship so much coveted, that an attempt was made to take from him the power of appointing a deputy to read the solemn lectures, (one of which are directed to be read every academical term). Upon this he printed a statement of his case for the use of the Members of Convocation, and the ungenerous proposition was heard of no more.

Upon the establishment of the Queen's household, in 1763, Dr. Blackstone was appointed her Majesty's Solicitor-General, and at the same time was chosen a Bencher of the Middle Temple.

Before this he had collected his *Tracts*, and published them in two volumes octavo; and in 1765 appeared the first volume of the *Commentaries*. Thus there was an interval of twelve years between the delivery of his lectures at Oxford and the publication of the *Commentaries*; and although it has been remarked that at the time Blackstone wrote his great work he had seen but little practice, it was doubtless considerably improved by his subsequent experience. Of the *Commentaries* so much has been said that it is almost impossible to say anything new. We will speak of them then in the words of a master,—one who, having investigated their foundation, is

competent to judge of the learning displayed in them, and who being himself gifted with a congenial mind, is qualified to speak of their elegance. "It is easy," says Mr. Justice Coleridge, "to point out their faults; and their general merits of lucid order, sound and clear exposition, and a style almost faultless in its kind, are also easily perceived, and universally acknowledged: but it requires, perhaps, the study necessarily imposed upon an editor to understand fully the whole extent of praise to which the author is entitled; his materials should be seen in their crude and scattered state; the controversies examined, of which the sum only is shortly given; what he has rejected, what he has forborn to say, should be known, before his learning, judgment, taste, and, above all, his total want of self-display, can be justly appreciated."

Like a bee among the flowers, Blackstone has extracted the sweet essence of all former writers, and left their grosser matter. We find in the Commentaries the copious learning of Coke, the methodical arrangement of Hale, Gilbert and Foster, combined with the smooth and pleasing style of Addison and Pope. The Commentaries form an era in legal literature, and since their appearance law-treatises have not been by any means so much as formerly a mere collection of decided points, loosely strung together, with little to connect them and nothing to explain, more valuable for the references in the margin than the matter in the text. The design of Blackstone is to give a general statement of the doctrines of our law, and a general account of our political institutions. In this he has been eminently successful, but we are not to expect to find those doctrines discussed upon principles of jurisprudence, or those institutions inquired into with regard to any Utopian theory. He is rather a historian than a philosopher, and his occasional remarks are made for the purpose of explaining the law, and not to prove its reasonableness.

It would have been singular if a work of such high authority, relating to topics of such general interest, had appeared without animadversion. His remarks on the constitution were obnoxious to the Whigs; his comments on the penal laws relating to religion were displeasing to the Dissenters. For his political opinions he was attacked by Bentham and Sheridan, perhaps as much from a desire of gaining reputation by a

pamphlet as from an anxiety for the truth. His observations on the laws against nonconformity produced some acrimonious remarks from Priestley, which Blackstone, conceiving his sentiments on religious liberty to have been misunderstood, answered. To this answer Priestley, never unwilling to appear in print, replied. Dr. Furneaux also addressed to him some tedious letters on his exposition of the Toleration Act. All his adversaries acknowledged the high merit of the Commentaries, and accompanied their strictures with a compliment. It must be admitted that Blackstone had displayed an undue partiality for the harsh and intolerant laws of Elizabeth and Charles, and although, to his great credit, he modified his remarks thereon in subsequent editions, they are still such as a liberal mind cannot altogether approve.

The legal accuracy of the Commentaries was, generally speaking, unimpeachable. It will be found, however, that the law as to the meeting of commissioners of bankrupts and choice of assignees was altogether wrong in the first edition; but this, on the intimation of one of the commissioners, was corrected in the second. Such trivial faults in a work of such general excellence are like spots in the sun, which do not diminish its brightness, yet deserve to be noticed for their singularity.

The Commentaries passed through eight editions in the life of the author. The last edition, by Lee, Hovenden and Ryland, is called the eighteenth, besides numerous heterodox impressions. In 1771 an edition was printed at Philadelphia, to which there were no less than 1600 subscribers. One attorney orders thirty-one sets, and another twenty-eight. The attornies in those parts were very liberal to their clients, or else they sold books.

In this year (1765) a transaction occurred in which Blackstone was concerned, and which, for want of something better, may be mentioned as an incident. A Dr. Musgrave, one of those finders of mares' nests who occasionally exhibit themselves and their discoveries, was told by a casual acquaintance at Paris that the French government had bribed Lord Bute, Lord Holland, and a lady of title whose name he knew not, in order to induce the English to grant peace. Distended with importance as being the depository of so great a mystery, he hastened to London, determined to cause a searching inquiry

into this matter. Having some knowledge of Dr. Blackstone, he advised with him as to the steps he should take; and, according to his account, Blackstone, upon reading his written statement, "trembled, seemed much affected, and let the paper drop, as in great agitation," and said, "You must by all means go to the ministry; it is an affair of an alarming nature." Three days afterwards Blackstone sent a note desiring to see Dr. Musgrave, and when the doctor waited on him, asked if he had been to the ministry, and said, "If you had not, I should think myself obliged, as a servant of the crown, to go and give the information myself." This statement, if true, would make Blackstone appear a remarkably credulous and timid man, since every other person to whom Dr. Musgrave mentioned his story (among whom were Lord Halifax and Colonel Barré) considered it merely an idle gossip; and such was the unanimous opinion of the House of Commons when, Dr. Musgrave having published a pamphlet on the subject, a Committee was appointed to inquire into the matter. Blackstone, however, read before the Committee a minute taken by him at the time, which gives a very different account of the affair. He says—"As the acquaintance between Dr. Musgrave and myself was small, I was surprized at the communication. I told him that the affair was delicate both as to things and persons, and that he should well consider the consequences if his friend should deny it. I begged to be excused advising him, but that he would do right to consider that it would depend on the conviction of his own mind and his friend's veracity. It was equally a duty to disclose such a transaction if on good foundation, and to stifle it in the birth if founded on malice, or ignorance. We parted. He seemed inclined to proceed. I do not recollect the conversation he mentions three days afterwards. It might be. I thought him such an enthusiast that the information might have disordered his imagination."¹

This by way of episode. In 1766 Blackstone resigned his employments at Oxford, viz. the Vinerian Professorship and the Principality of New Inn Hall, finding his engagements in London inconsistent with an attendance to the duties of those offices.

In the parliament of 1768, Blackstone was returned for

¹ 16 Parl. Hist. 778. 781.

Westbury, in Wiltshire. He is not reported to have taken any part in the proceedings of the House until the case of Wilkes set the country in a blaze in 1769. The question mooted in this case being of great constitutional and legal importance, Dr. Blackstone took part in the discussion. On the 1st of February he moved that Wilkes's petition respecting the alteration of the record of the indictment against him, by Lord Mansfield, "was an audacious aspersion on the Chief Justice, calculated to convey a gross misrepresentation of the fact, and to prejudice the minds of the people against the public administration of justice." Again, he spoke in support of the motion for expelling Mr. Wilkes the House, grounding himself on the three obscene and impious libels. And again, when the resolution was moved, "that John Wilkes, Esq. having been in this session of parliament expelled this house, was and is incapable of being elected a member to serve in this present parliament," Dr. Blackstone argued in favour of the resolution. Mr. Grenville replied to him, and quoted a passage from the Commentaries, which was thought a powerful argumentum ad hominem. "Instead of defending himself upon the spot," says Philo Junius, "he sunk under the charge in an agony of confusion and despair. It is well known that there was a pause for some minutes in the House, from the general expectation that the doctor would say something in his defence, but his faculties were too overpowered to think of those subtilties and refinements which have since occurred to him." Sir Fletcher Norton, however, more expert in debate, stood the Commentator's friend, and took Grenville to task. The only remnant of the debate is the following remark addressed by Sir Fletcher to Mr. Grenville: "I wish the honourable gentleman instead of shaking his head would shake a good argument out of it." It must have been entirely owing to Blackstone's inaptitude to speak that he did not reply to Grenville, since the passage cited from the Commentaries did not bear against him. It was an enumeration of disqualifications to serve in parliament, not mentioning the case of expulsion, and concluding with these words, "but, subject to these restrictions and disqualifications, every subject of the realm is eligible of common right," which merely meant that eligibility was the general rule, and ineligibility the ex-

ception, and it was unreasonable to expect that every exception would be particularly set forth in a work of the general nature of the Commentaries.

It was considered so important an object to deprive the ministry of the authority of Blackstone, that the point which the parliamentary skill of Grenville had made was reiterated upon the Commentator in a pamphlet by Sir William Meredith. To vindicate himself Blackstone published another pamphlet. This caused him to be attacked by Junius, and he answered Junius in a Postscript of six quarto pages. A more elaborate production is attributed to him on this subject, entitled, "The case of the late Election for the County of Middlesex considered on the principles of the Constitution and the authorities of Law." Whatever may be the opinions entertained at the present day concerning the proceedings against Wilkes, it is unfair to suppose that the part Blackstone took therein was not the result of sincere conviction, for there is nothing unreasonable in the opinion that an individual who is obnoxious to the criminal laws of a country is unfit to be a legislator, and that when a member is expelled by the House of Commons, their decisions shall be binding upon the people to prevent them again returning him; and it is worthy of remark that Grenville had in a former debate referred to Walpole's case, (the authority relied on by Blackstone,) and strongly insisted that the law of parliament established in that case was, that expulsion created only a temporary, and not a perpetual incapacity in the party expelled.¹

These personal collisions within the House of Commons, and printed controversies without, so little in accordance with the philosophical habits of the commentator, were too much for his ambition. He, therefore, refused the Solicitor-Generalship, which was offered to him by Lord North on the resignation of Dunning, in January, 1770: and it was not until the March following that the vacancy was filled by Thurlow, a man every way more adapted to political contention. Blackstone was appointed to the more congenial situation of a Judge of the Common Pleas, Mr. Justice Clive having resigned; and, on the 9th of February, kissed his Majesty's hand. He was of course called to the degree of Serjeant, and

¹ 16 Parl. Hist. 562.

gave rings with the motto, "*Secundis dubiisque rectus.*" "But Mr. Justice Yates being desirous to retire" (we use the words of Blackstone himself) "into the Court of Common Pleas, I consented to exchange with him; and accordingly (February 16th) I kissed his Majesty's hand on being appointed a Judge of the King's Bench, and received the honour of knighthood." Sir Joseph Yates did not long survive his *retirement*, for on the Whit Sunday following he was taken ill at church, and died on the Thursday, "to the great loss of the public, and the Court of Common Pleas in particular, wherein he sat one term only," quoth Serjeant Wilson. On this event, Sir William Blackstone likewise *retired* into the Court of Common Pleas, "which," says Burrow, "he was always understood to have in view whenever opportunity offered."

Although greater leisure, combined with an equal share of dignity, had doubtless induced Blackstone to prefer the judgment-seat of the Common Pleas to that of the King's Bench, he was by no means negligent in the performance of the duties of his office. There are several very elaborate judgments of his in his own reports upon recondite points of law, which display a range of reading and diligence of investigation, rarely equalled. The Court of Common Pleas during the time of Blackstone, like the King's Bench during the presidency of Lord Mansfield, differed in opinion only upon two cases. In both Blackstone was the dissentient. The first was the well known case of *Scott v. Shepherd*, (2 W. Bl. 892,) relative to the distinction of actions of trespass and case. The judgment of Blackstone is often referred to, on account of the lucidness with which the doctrine on the subject is stated and explained, and his application is generally considered the more satisfactory. The other case was *Goodright dem. Rolfe v. Harwood*, (2 W. Bl. 937,) in which the judgment of the Common Pleas was unanimously reversed by the King's Bench, and that reversal was confirmed by the House of Lords upon the opinion of the Barons of the Exchequer. The judgment too of the Commentator, in the celebrated case of *Perrin v. Blake*, (1 W. Bl. 672,) is one of the most valuable pieces of legal reasoning upon record. We cannot, therefore, agree in the remark of Mr.

Roscoe, "That after the publication of the Commentaries, the legal acquirements of Blackstone rather declined than advanced." His abilities always shone with an equal lustre as an author, an advocate, and a judge; of which the argument in *Tonson v. Collins*, and the judgment in *Perrin v. Blake*, are sufficient to convince us.

Blackstone did not allow those intervals of leisure which he had been so anxious to obtain, to pass unprofitably away. It is not the least of his merits, that he was among the earliest in advocating the Penitentiary system of prison discipline, which has been so eminently successful in America, and will ere long be a means of diminishing crime throughout the world. In conjunction with John Howard, that glory of humanity, he was instrumental in procuring the enactment of the stat. 19 Geo. III. c. 74, for erecting penitentiary houses for the confinement of prisoners, as a substitute for transportation. This, like most other important benefits to mankind, was destined at first to be ridiculed and neglected, and the original propounders obtained no credit from it. Men, when they cannot perceive the extent or advantage of an invention, conceal their ignorance beneath the mask of contempt. Now that the utility of these things cannot be denied, let us not forget to praise those who discovered them before us. Howard and Blackstone may be insensible to our applause, but it is a consolation and encouragement to neglected genius to think, that although now despised, his memory may be held in reverence by posterity.

There was another affair in which he busied himself, more personally interesting to himself, but not on that account the less beneficial to the public. This was an augmentation of the judges' salaries. These being found insufficient to support the judicial dignity, by reason of the heavy taxes, and more expensive mode of living, £400 was added to the salary of each puisné judge.

Amidst these public and general undertakings he did not overlook the improvement of the neighbourhood where he resided. He passed his vacations at a villa called Priory Place, near Wallingford, (now in the possession of his grandson, the present Member for Wallingford). Here, by his activity, he procured two turnpike roads to be made through

the town, by which the malt trade was considerably increased. He also promoted the rebuilding of St. Peter's Church there, of which he planned the elevation; and erected the spire, so universally admired for its lightness and elegance, at his own expense. At the request of the trustees of Sir George Downing, he had undertaken to frame a code of statutes for Downing College, Cambridge, then about to be established, but this he was prevented from completing by death.

Now that it was not necessary for him to devote himself exclusively to business, he again indulged in literary pursuits, which we may imagine were most congenial to his nature. The only fruits of his subsequent literary labours of which we are aware, are "An Account of the Dispute between Addison and Pope," communicated to Dr. Kippis, and by him published in the "Biographia Britannica," in the Life of Addison; and some notes upon Shakspeare, which are published in Malone's edition of 1780, marked by the final letter of his name. It is hardly necessary to observe, that both of these productions are characterized by the pure style and lucid order of Blackstone. The first has been praised by Mr. D'Israeli, a very high authority on such subjects.

In this calm and useful manner passed the latter years of Blackstone's life. Having attained the fulness of his fame he wore away his time, now hearing and deciding disputed points of law—now promoting plans of public improvement—now narrating the quarrels *generis irritabilis poetarum*, as a river swelled by all its tributary streams flows calmly towards the sea, fertilizing the country in its course, and rendering the landscape beautiful.

The sedentary employments in which Blackstone delighted were not conducive to health. As he advanced in age he became corpulent, and was occasionally visited by gout, dropsy, and vertigo. In Christmas, 1779, he was attacked by a violent shortness of breath. Of this he was so far relieved by the application of the remedies usual in cases of dropsy, as to be able to come to town for the purpose of attending Court in Hilary Term. He had hardly arrived ere his malady returned in a more formidable shape; and after lying in a state of insensibility for several days, he expired at

his house in Lincoln's Inn Fields, on the 14th of February 1780, being in the 57th year of his age. He was buried at St. Peter's Church, Wallingford; his friend, Dr. Barrington, Bishop of Landaff, officiating at his funeral.

His only posthumous honour was the following rude distich which appeared in the public prints of the day:—

“ He's gone whose talents charm'd the wise,
Who rescued law from pedant phrase,
Who clear'd the student's clouded eyes,
And led him through the legal maze.”

He left behind him seven children: Henry, James, William, Charles, Sarah, Mary, and Philippa; the eldest only sixteen years of age. Henry Blackstone, the reporter, was his nephew, and died from the effects of over exertion in his profession. Of his sons, James enjoyed nearly the same University preferments as his father: he was Fellow of All Souls, Principal of New Inn Hall, Vinerian Professor, Deputy High Steward, and Assessor in the Vice-Chancellor's Court. He died in 1831, having resigned the Assessorship in 1812, and the Vinerian Professorship in 1824.

The chief characteristics of Blackstone appear to have been prudence and industry; we may perceive him calmly and gradually working his way from obscurity to eminence, undeterred by disappointment or neglect. He never abandoned a good possessed for a contingent benefit; thus when he found his chance of advancement at the bar less than it was at the University, he went to settle at Oxford; still, however, persevering in professional pursuits. He did not venture to enter into the blissful estate of matrimony (although he was a man domestically inclined) until he found he could safely dispense with his fellowship: and he preferred the less prominent, but more secure, station of a puisné judge of the Common Pleas, to the slippery path of a political advocate.

His mind was rather discerning than vigorous, calculated rather to form a judgment on and explain existing things, than to strike into a new path and boldly advance an original theory. He shrank from controversy, and sought rather to instruct the ignorant than to dispute with the learned. Thus

it was that he excelled in delivering lectures from the professor's chair, but did not so well succeed in forensic arguments or political debates. When he had considered a question, he could elegantly and lucidly state and explain his opinion; but he could not readily answer an unanticipated objection, or retort upon a contumelious adversary. There could hardly have been a mind better constituted for the judgment-seat,—too cautious to abandon precedents, and too clear to misapply them. Cool and deliberate, he was not likely to be misled by a fallacy, nor to decide on a hasty impression: and we cannot but think that Blackstone is not reckoned amongst our first judicial characters only because he did not occupy the most eminent station.

It may be inferred from what has been said, that he was neither an enthusiast in religion nor politics; in the former he was a sincere believer in Christianity, from a profound investigation of its evidences; in the latter he was what would be now called a Conservative, friendly to a mild but authoritative government, inimical to the agitations of pretended patriots.

In private life we are told he was an agreeable and facetious companion, tender and affectionate as a husband, father, and friend; strict in the discharge of every relative duty: towards strangers he was reserved, which to some appeared to proceed from pride. His temper was rather remarkable for irritability, which in latter years was increased by his bodily infirmities.

There may have been more shining characters, about whom we read with deeper interest, but there have been few men more useful in their sphere, few whose example we can contemplate more profitably, few who better realized the wish thus happily expressed by himself:—

“Untainted by the guilty bribe,
Uncursed amidst the harpy tribe;
No orphan's cry to wound my ear,
My honour and my conscience clear;
Thus may I calmly meet my end—
Thus to the grave in peace descend.”

D. G.

ART. IV.—LADY HEWLEY'S CHARITIES.—CASE OF THE ATTORNEY GENERAL *v.* SHORE AND OTHERS.

AMONG the vast and various powers exercised by Courts of Equity over the property of British subjects, there is none of more consequence and difficulty than that assuming to construe and interpret the intentions of individuals as solemnly expressed by will or deed. A necessity for this, as is well known, arises frequently in cases, both of patent and of latent ambiguity, as they are technically styled; of ambiguity arising from the use of expressions themselves obscure or inconsistent, and of ambiguity arising from the use of expressions which, though sufficiently clear and precise themselves, are shown by extrinsic evidence to be susceptible of more than one application. To remedy the inherent and unavoidable uncertainty of language, and obviate as far as possible that necessary evil by fixed rules of interpretation and construction, is a very practicable and useful course, and one which all experience teaches, notwithstanding solitary cases of hardship, to have been productive of great general good. But it is an office far more difficult, a power far more formidable, however absolute at times the necessity for it, to put a meaning not on the words, but on the designs of men, to decide, not that which they have said, but that which they must have wished to say. And how much is the difficulty of this enhanced, if the intentions of the individual in question may be supposed to have depended, not on certain known facts and circumstances by which he was surrounded, but rather on some peculiar opinions which he entertained; how much more so, if those opinions related not to objects having a certain and material existence, but to things invisible and speculative, concerning which a great variety of sentiment might exist consistently with a rational state of mind.

Such, however, and so great, is one of the many difficulties presented by the case to which this article will be devoted. To the mere lawyer it is therefore highly interesting; to the public pre-eminently so for other reasons. Rarely, indeed, if ever, has a question more important been submitted to the

decision of the Court of Chancery. It is important in itself as it concerns the future distribution for charitable purposes of a sum but little short of three thousand pounds annually, and does also in some degree involve the character and respectability of persons well in station and repute. It is more important in its consequences, as the fate of other religious charities, very numerous and valuable, depends on its ultimate result; as it threatens to extend the jurisdiction of our Courts of Equity to a class of cases over which they have seemed hitherto to shun assuming cognizance; and as it may go to augment greatly the means and power of a sect already formidable, as some think, to our establishment, from their numbers, their talents, and their zeal.

The chief ground on which the relators, who are understood to be acting on behalf of the Independent denomination of Dissenters, claim to exclude the defendants from all participation in this charity, is the nature of their religious sentiments, which are, with one or two exceptions, alleged to be what are commonly called Unitarian, although the defendants themselves, in some sort, decline that appellation, and wish rather to be styled Presbyterians, for reasons that will presently appear. In a work devoted to legal topics like this, it is scarcely needful, before making any remarks on this case, to disclaim all intention of obtruding any opinion upon questions of theology, a task alike unsuitable to our purpose, ability, and inclination. But to avoid all risk of being, even erroneously, accused of engaging in a religious controversy, it will be better to assume throughout that Unitarian doctrines, contrary as they are to those of our church, are contrary to the true sense of Scripture,—an assumption not otherwise material, if, as we believe, the question of law, be these doctrines right or wrong, remains the same. Still the mode in which this case has been argued, and in part decided, will make it indispensable to notice something, both of doctrine, and of commentary upon doctrine, in reviewing it.

Sarah Lady Hewley, the foundress of the charities in dispute, was born in the year 1627. She was the daughter of Robert Wolriche, a bencher of Gray's Inn, and was married young to Sir John Hewley, a member of the same society. Her husband, who was by birth a Yorkshireman, represented

his county town during part of the reign of Charles II. Wealthy and without children, this worthy pair employed their superfluous means in works of hospitality and charity, of which ejected Presbyterian ministers, at that time suffering under the consequences of the Act of Uniformity, appear to have partaken largely. Whether Sir John Hewley ever avowed himself a Presbyterian is doubtful, but there is no question that his wife lived and died a true and faithful member of that body. When left a widow, an event that occurred many years previous to her death, she appears to have devoted a fortune, which, in those times, must have been considered vast, to purposes of good. Without near relation or connexion, she did not waste her isolated sympathies upon trifling or unworthy objects, but sought out with secrecy and care all around her who were in misery or want, and by many public and more private channels, diffused the copious stream of her beneficence throughout her vicinage. Indeed the testimony of Dr. Colton and other of her cotemporaries fully shows, that although she might lack the commanding qualities of a Hutchinson or a Russel, her piety and benevolence entitle her to a place among the female worthies, with whom the seventeenth century in England was so rife. Her obtaining that, through the publicity given to her merits by this dispute, may possibly be its only good result.

This worthy and charitable person made the first of the deeds, now in question, on the twelfth and thirteenth of January, 1704, appointing seven of her friends, who seem to have been all Presbyterians, and some noted ones, trustees of various estates, upon trust after some provisions immaterial here:—

1. To assist poor and godly preachers, for the time being, of Christ's Holy Gospel.

2. To assist poor and godly widows of the same description of persons.

3. To encourage and promote the preaching of Christ's Holy Gospel in poor districts and places.

4. To assist in the education of young persons intended for the ministry of Christ's Holy Gospel.

5. To assist poor and godly persons in distress.

On the 26th of April, 1707, about three years before her

death, she made another deed, appointing the same persons trustees, and providing for the maintenance of ten poor persons in an almshouse, which she had previously founded at York, and directing the rest of the property to be applied to the same objects as were mentioned in the deed of 1704. To the later one she appended some rules and orders for the observance of the trustees, of which the most material are,—

“ That every almsbody be one that can repeat by heart the Lord’s Prayer, Creed, Ten Commandments, and Mr. Edward Bowles’s Catechism.”

“ That the almspeople duly repair to some religious assembly of the Protestant religion.”

A set of subtrustees were also to be appointed to manage the hospital and admit the poor on any vacancy.

Under these deeds the trustees and their successors went on exercising an undisturbed administration of the charity, until the publication of that part of the Commissioners’ Report relating to it, in which the following passage occurred: “ It does not appear to us, on inquiry into the administration of this charity, and examination of the books of account, &c., that the trusts are otherwise than duly performed in all essential particulars, unless it is to be considered a departure from Lady Hewley’s intention, that part of the revenues should be applied in favour of dissenting ministers, who entertain and preach Socinian or Unitarian doctrines of faith, or in the allowance of stipends to widows of such ministers, and exhibitions to students brought up in those sentiments.” The Report afterwards goes on to say that the commissioners think this question ought to be submitted to the consideration of a Court of Equity.

At an annual meeting of Independent ministers for the county of Lancaster, held on the 9th of April 1829, it was resolved to print separately this part of the report, which was accordingly edited by Mr. Hadfield, an attorney of Manchester, and subsequently in June 1830, in accordance with its recommendation, an information was exhibited at the relation of Mr. Wilson, president of the Independent college at Highbury, Hadfield, and others, against the trustees, persons of wealth and station in the north of England, and also against the sub-trustees, the most remarkable of whom are the Rev.

Charles Wellbeloved, theological tutor of the dissenting college at York, and minister of St. Saviourgate Chapel there, which was the one frequented by Lady Hewley, and the Rev. John Kenrick, another tutor of the same college.

This information, as afterwards amended, charged generally on the defendants a misapplication of the funds, in assisting Unitarian ministers and their widows, particularly in allowing eighty pounds a year to Mr. Wellbeloved; a disregard of the rules of the almshouse; and a misappropriation in granting the exhibitions to a college devoted to the education of Unitarians. It therefore prayed the court to pronounce Unitarian preachers, their widows, and Unitarians generally, unfit objects for the charity, the exhibitions unfitly bestowed for promoting the preaching of Christ's Holy Gospel, and the allowance to Mr. Wellbeloved improper. It further prayed a declaration that those dissenters only were within the scope of the charity, who were protected by the Toleration Act, and the removal of all the trustees.

The cause was heard before the Vice-Chancellor on several days in December, 1833. Although there was much contradiction on that head, it may be taken to have been established by the evidence, that as many as thirty-eight ministers, deriving assistance from this charity, preached what are called Unitarian doctrines, (there being one hundred and ninety-nine other ministers, and sixty-two other persons, on the list of beneficiaries); and that of five exhibitions, four had been granted to students at the Unitarian college.

Immediately after the reply of Sir E. Sugden, the Vice-Chancellor, without taking further time to consider, proceeded to give his judgment, by which he declared Unitarians generally to be unfit for sharing the benefit or management of these charities, removed all the trustees, and granted a reference to the master to appoint others in their room, but without condemning the defendants in any costs: his decree in substance being, according to Mr. Baron Alderson, that no persons who deny the Divinity of our Saviour's person, and who deny the doctrine of Original Sin, *as it is generally understood*, are entitled to participate.

From this judgment the defendants appealed to the Lord Chancellor Brougham, and the whole case was re-argued at

great length before him, assisted by Judges Littledale and J. Parke, at different times in the year 1834. The argument being concluded at the time of the change of ministry in the November of that year, Lord Brougham was desirous of giving his decision before his retirement from the Court, but the counsel for the relators declining to accede to this, the whole case was again gone into before the Lord Chancellor Lyndhurst. The return of a Whig ministry to office, taking place before this third hearing was concluded, it was agreed by both parties, previously to the last day's proceedings, to submit to Lord Lyndhurst's judgment, although given after the vacating of his seat. Some alarm seems to have been subsequently excited on the defendants' side, as to the turn that judgment was likely to take, either from the unequivocal demeanour of his lordship and Mr. Baron Alderson on the last day's hearing, or from other causes unknown to us; and persons not parties to the suit, but interested as beneficiaries in the charity, accordingly came in to protest against any further proceedings. It was said that the submission was invalid, as wanting the consent of the Attorney-General in respect of such claims as the crown might have, and Mr. Booth endeavoured, though in vain, to press the propriety of an express consent by that law officer as a preliminary to the decision finally made by Lord Lyndhurst, on the 5th of February last; when his lordship delivered in Gray's Inn Hall an oral judgment of great ability, being attended by Mr. Baron Alderson and Mr. Justice Patteson, the former of whom at the same time read the similar and concurrent opinion of himself and his brother judge. The decision of Lord Lyndhurst, though proceeding on different grounds, was the same in effect as the Vice-Chancellor's, with the addition that the defendants were left to pay their own costs, instead of having them allowed from the estates. Such is briefly the history of the case: the principles which it involves we next proceed to consider.

That the advantages conferred by these deeds were designed for Protestant Dissenters, appears to be agreed on all hands. The known Presbyterianism of the foundress, the selection of Presbyterians as trustees, the very phraseology of the trusts, which provide for the aid of "godly preachers,"

a term at that time appropriated to dissenting ministers, place this beyond reasonable doubt. That a charity created for such purposes is legal, and will be supported and enforced by Courts of Equity, has been established by numerous decisions.¹ The question is therefore limited to inquiring—what sects of Dissenters are included,—what, if any, excluded by the language or intention of the deeds? The judgment of the Vice-Chancellor proceeded mainly on the words of the particular trust for the “Preachers of Christ’s Holy Gospel,” as he held that Unitarian preachers could not possibly be considered such, and that therefore they, and inferentially Unitarians, which he considered the defendants proved to be, were without the pale of the charity. The mode by which his Honour came to these conclusions was thus burlesqued in a sixpenny pamphlet, published by some zealous partisan of the Independents, and extensively circulated at that time.

“It was proved that he” (one of the defendants) “had preached and published a certain sermon, containing certain sentiments, which sentiments he never retracted. This sermon therefore became of course legitimate evidence. It was also ascertained that the said preacher *used*² and approved of a certain version of Scripture called ‘The Improved Version.’ If then it could be shown that this so-called Improved Version of Scripture is fundamentally opposed to the ascertained mind and meaning of Lady Hewley, the said preacher can have no right, title, or claim whatever to any benefit in the said charity or endowment.”³

Although the Vice-Chancellor did not arrive at his result by such a Rhodian leap as this, he certainly found considerable difficulty in fixing the defendants with what are called Unitarian opinions, and to effect that end was driven to assumptions hardly consonant with judicial prudence. Thus it being proved that four of the defendants, a trustee, and three sub-trustees, were subscribers to a society called “The British and Foreign Unitarian Association,” circulating among

¹ *Attorney-General v. Andrews*, 1 Ves. sen. 225; *Attorney-General v. Cock*, 2 Ves. sen. 273; *Waller v. Child*, Amb. 524; *Attorney-General v. Wansey*, 15 Ves. 231.

² The contrary appears from the evidence to be the fact.

³ *Christ’s Holy Gospel vindicated*, p. 3.

one hundred and forty-nine other works, two editions of a so-called translation of Scripture, which his Honour thought, in fact, an imposition of the Unitarian Creed ; he thence proceeded to infer that *all* the defendants must be held to be imposers of this creed, though it did not appear that any used the translation either in their public or private devotions, or taught it in the academy with which some of them were connected ; the contrary being indeed the fact. By a similar process of reasoning, it would be hardly less fair to infer that a member of a literary society circulating the works of Gibbon was an infidel, or a subscriber to a new edition of Descartes' mathematical works a believer in the theory of vortices. But it has been urged, for both judge and counsel felt the strain of this bold conclusion from such premises, that it was necessitated by the craft and want of candour of the defendants, who in their answers studiously avoided to admit themselves Unitarians, and would make no confession of their faith in other words than those of Scripture. They seem however to have pursued this course on the best legal advice, and it would surely be a novelty in pleading, if a party should admit in his answer more, that tends to his adversary's advantage, than he cannot legally avoid. If the result of following this usual practice in the present case be so embarrassing, it seems only to prove one of two things,—either that the matter in dispute is unsuited for the consideration of a Court of Equity, or that the system of taking evidence therein maintained requires amendment. Either of these may be the true hypothesis, but neither can justify judicial inferences without adequate proof, or authorize censures upon motives of individuals exercising an undisputed privilege. Lord Lyndhurst, though he considered the Unitarianism of the defendants sufficiently made out before him, vindicated at the same time the character of the defendants by the following just remark : “ An observation was made, I think by a learned gentleman whom I now see in court,” (Mr. Knight,) “ on the conduct of Mr. Wellbeloved with respect to his answers, stating that they were reluctantly obtained with difficulty. I think I owe it to Mr. Wellbeloved and to the other defendants, to observe that from the nature and delicacy of the subject they were justified in using much caution. And if we can fairly

refer the conduct of men to proper motives we are not justified in ascribing it to such as are improper.”¹

But suppose this preliminary obstacle had been removed from the Vice-Chancellor's path ; suppose that one and all of the defendants had distinctly avowed that they were circulators of this “ Improved Version ;” that they affirmed and taught it to be the best translation of Scripture, and that they used it in public and in private. His judgment would then rest upon the ground that the defendants were imposers of a creed, by imposing a certain version of Christ's Holy Gospel, of which Gospel they must be held to be neither preachers nor believers, and consequently not fit to manage or enjoy this charity. It must here be observed that imposition is itself a word of dubious meaning. Imposition of a creed in its ordinary sense would seem to imply the depriving those imposed upon of any liberty or power to exercise private judgment upon it, as the Roman Catholic Church may be well said to impose a creed, where it prohibits all theological teaching not in accordance with its views, and forbids even the popular use of Scripture. In such sense Unitarians have neither the power nor the will for imposition. As supporters of an improved version they would in common parlance be termed advocates and teachers rather than imposers of a creed. Again, if we are to take the sense in which his Honour used the phrase, from his observation that “ this is not a translation but something substituted for a translation, and can only be regarded as a creed which the makers of it intended to impose upon others ;” and from his charge of “ wilfully altering Scripture ” to their translation, “ than which nothing can be more unsatisfactory, more arbitrary, more fanciful, more foolish or more false,” the defendants might be better termed impostors than imposers.

But on what evidence does the conclusion of this great criminality rest ? It is to be observed that most assailants of the Improved Version have not, even in the heat of theological controversy, charged more upon its advocates than the extreme of prejudice and ignorance, and assuming that the alterations of the latter are invariably wrong, are there

¹ Short-hand writer's Report.

any for which some prejudice or ignorance might not account ? It must be admitted that all translators and interpreters of that on which a creed is founded, are in some sort imposers of a creed, as they must of necessity form opinions of their own as to the meaning of the original text. And be they honest or impartial as they may, there must be many passages of dubious meaning, and more that to them may appear dubious, where their own preconceived opinions will induce them to prefer a version of a particular word or phrase, which may be neither the usual nor the natural one. If they have a previous belief that a particular doctrine is the true one, they will be pretty sure to imagine that they find it somewhere expressed or implied in their original ; if on the contrary, that it is a false one, they are generally able to persuade themselves that the passage, which appears to contain it, is susceptible of quite a different meaning. What a striking instance of this is afforded in the different versions of that word, which has given rise to a mistranslation, perhaps the grossest of all in the Improved Version. "Hypostasis" is so exactly and perfectly rendered by "Substance," that Mr. Knight, in his own pithy phrase, would certainly "flog a son of his" for translating it by any other term. Nevertheless the improved versionists, having their peculiar notions on the subject of the Divinity of the Saviour, would not say "express image of his substance," but rendered the passage "express image of his perfections," which they seem to have arrived at by assuming "hypostasis" might bear the sense of "quality," and then considering that the qualities of God are all perfections. Here is a version so grossly incorrect that it might almost raise the suspicion of wilfulness at first sight. But how has the same text been handled by the orthodox ? When Beza, the renowned follower of Calvin, was framing his Latin version of the Scriptures, the text appalled him in a different point of view. To admit that the Son was the express *image* of the Father's "substance," was in a manner to admit that the two were not identical ; to yield up the controversy respecting the Homoeousion and Homoiousion, the same and the similar substance, which had convulsed the Christian world, and helped to sever the Latin from the Greek church. As a devout believer in the consubstantiality, Beza

could not persuade himself that the word in this passage bore its usual sense, and at once vindicating the doctrines of the Homocousion and the Trinity he translated it "persona." The learned and pious translators of our English Bible, alike believers in the identity of substance, and the distinction of persons in the Godhead, adopted this interpretation, and it is now the received one in our common versions. Would any one on this account be so presumptuous or uncharitable as to charge the illustrious disciple of Calvin, or the holy fathers of English Protestantism, with wilful alteration of the Scripture? Would he venture to say more than that their zeal for a cardinal point of faith had somewhat clouded their philological acuteness? If so, how shall man conclude, and much more, how shall judge decide, that the errors of the Improved Version spring from more evil sources? Had, indeed, these improved versionists interpolated or garbled Scripture, as some dishonest Trinitarian in olden time did, when he thrust into the sacred text the now generally admitted forgery of the "three heavenly witnesses,"¹ to establish if possible thenceforward the Trinity of the Godhead beyond all doubt, there might have been fair ground for charging them with wilful imposition or deceit. But if all are liable to translate wrongly in consequence of their peculiar creeds, the question of mistranslation becomes one of degree merely, and the judge is called upon to draw the line between that amount of error which proves wilful deceit, and that which proves no more than prejudice; to fix the precise point where self-delusion ends, and dishonesty begins. What powers short of infallibility could be equal to such a dissection of motives, we confess ourselves at a loss to conceive. It is true that in aid of such an investigation some tests might be proposed, not absolute indeed, but approximate. Thus it might fairly be inquired respecting the "imposers" of this version, whether the variations from the common text in it had met the approval of none but persons of Unitarian tenets, or whether persons indifferent to religion, and examining Scripture only as philologists, had convicted them of dishonest perversion; or whether their alteration of passages was pecu-

¹ 1 John, v. 7.

liarily confined to those contrary to their own dogmas? But in the present instance, these evidences of criminality of intention are wanting. There is scarcely one of these much reprobated mistranslations which has not had the sanction of some high classical or orthodox authority; and there is, we believe, no instance of any indifferent critic accusing or suspecting these versionists of wilful alteration of sense, while it is certain that they have changed the common text in numerous passages containing no matter of doctrine. The Vice-Chancellor's judgment therefore rests on his single opinion, unsupported by dispassionate witnesses, that the mistranslations of this version are so gross and abominable, that it is impossible they could have been introduced without dishonesty of purpose; an insufficient ground, as it seems to us, for his decision, were he the most eminent judge and theologian that England ever saw.

Supposing these defendants had further put in evidence their peculiar theological opinions; that they had acknowledged their disbelief in the doctrine of the Trinity, and of the Divinity, or more strictly speaking, the Deity of the Saviour; of the Atonement and Original Sin, (on all which points we assume them to be in error); it is still difficult to understand how a judge shall be entitled to decide that the preachers of their sect are not preachers, and the followers of their sect believers of Christ's Holy Gospel; not indeed according to its true and full intent and meaning, but according to the best view thereof they were able in all sincerity to take. To say that because the views of a sect are erroneous in the eyes of the judge, he is therefore authorized in judicially pronouncing on their error, goes far to establish the principle that the participators in any charity established for religious purposes are only safe in their enjoyment of it, so long as their religious faith is in strict accordance with that of all the equity judges for the time being. Fatal indeed will be the consequences if any court, equitable or legal, shall arrogate to itself a jurisdiction of this nature, or if any fallible being shall take upon him to decide on opposing claims to property upon the premises of his own belief. Judges will then have to act as popes in pronouncing upon the truth or error of all refinements of religious doctrine, with the addi-

tional inconvenience that, unlike popes, they will venture to differ in opinion, and so give conflicting judgments.

We have thus ventured to submit a few objections to the judgment of the Vice-Chancellor in this case, first, because the grounds upon which it proceeded, and the parties against whom it was directed, were not shown to be connected by sufficient legal evidence; and secondly, because, (supposing them connected,) an erroneous translation of Scripture not proved to be intentionally falsified, a preaching of doctrines not correct, yet correct in the belief of the preacher, are not safe or sufficient grounds for an equity judge to exclude persons from a participation in the benefits of a charity given to promote the preaching of Christ's Holy Gospel, and to assist believers in it; such questions being indeed unfit for the decision of a Court of Equity, and beyond the scope of any fallible being.

That the view here taken was correct, seemed probable from the observations of Lord Brougham, fully acquiesced in by Sir Edward Sugden on the opening of the first appeal, that it was quite unnecessary, in order to decide this case, for either the bench or the bar to express any opinion on the religious belief of any person or party whatsoever, and, notwithstanding Mr. Knight's resumption of the weapons of contumelious bigotry upon the third hearing, it was there observed by the two judges, that "if this question at all depended on any investigation of the comparative truth and excellence of these doctrines, or upon a critical examination of texts of Scripture, (the only test to be applied by Protestants in such inquiries,) we should feel that this was not a proper tribunal, and that we were not sufficient for these things."¹

We stand therefore as yet merely on the threshold of the subject. The more we have to deprecate the decision of a question like this upon imputed dishonesty of motive, or assumed error in doctrine, as unjust to the suitor, and impracticable and unbecoming for the judge, the more imperative becomes it, in regard to a charity like this, accurately to consider the intentions of the founder. To this end it is

¹ Short-hand writer's Report.

first necessary to look at the language of the deeds themselves, it being a well-known principle, that if the words of a trust have a clear or even probable meaning, the Court will not inquire into the intention further. There is, however, one condition to be fulfilled before equity will enforce even a clearly expressed intention, and that is, it must not be contrary to any known rule of law. On this requisite three preliminary objections to the participation of Unitarians in this charity have been founded.

It has been contended, in the first place, that whether or not Lady Hewley might possibly regard them as fit recipients of her bounty, their system of religious belief was at the date of the deed contrary to law, the Act of Toleration¹ having expressly excepted from its benefits impugners of the doctrine of the Trinity, and the Act against Blasphemy, passed ten years later, having subjected those denying any one of the Three Persons to severe penalties: that her intention therefore, in so far as it embraced Unitarians, was unlawful and consequently void. Assuming this to be correct, as regards this sect, before the repeal of these penal and excepting clauses, although the intention to be gathered from the statutes is but doubtful, and although it was well urged by the Solicitor-General that the Act of Toleration also excepted all preachers who did not subscribe thirty-five Articles and a half of the established church, and yet that it was never supposed by any one, that Lady Hewley could not include those non-subscribers; there is at least a good answer to the argument, as affecting parties in our own time, that as a statute repealed must be considered as if it never had existed, so this part of the Act of Toleration being repealed by 53 Geo. III. c. 160, the purpose which was for a time unlawful, as contrary to the provision of the former, became lawful at the moment of repeal, and Unitarians, from that date at least, became fitting objects of the charity. Melancholy indeed would be the situation of the dissenting congregations in England if this were not a principle at least tacitly recognized in law, for many of their chapels are partly or wholly supported by endowments, established before the Act of Toleration had legalized any mode of dissent whatever.

¹ 1 W. & M. st. 1. c. 18.

It has been contended, in the second place, and Lord Lyndhurst sanctioned this objection so weighty in itself by making it in some degree a ground of his decision, that we cannot in the interpretation of a doubtful trust presume an intention contrary to law. "What," said his Lordship, "are the rules by which the conduct and the language of persons are to be interpreted? The rule is this, and it is a fair and proper rule, that where a construction consistent with lawful conduct and lawful intention can be placed upon the words and acts of parties, you are to do so, and not unnecessarily to put upon these words and acts a construction directly at variance with what the law prohibits or enjoins. I cannot therefore bring myself to the conclusion, that Lady Hewley intended to promote and encourage the preaching of doctrines contrary to law. That she intended herself to violate the law, it would be contrary to every rule of fair construction and legal presumption so to decide."¹ To this it might be perhaps replied, that Lady Hewley, in admittedly conferring her bounty on *non-subscribers*, is *proved* to have had some intention contrary to law. But the main defence is this, that however indisputable the truth of his lordship's excellent remarks, the case stands unaffected by them, for presumption of illegal intention is by no means requisite for the advocates of Unitarianism in this matter. The position which they seek to make out is no more than this, that Lady Hewley's purpose was not one strictly defined or limited, but of a catholic and general nature, embracing, and for the future to embrace, as far as circumstances should permit, all classes of Protestant Dissenters, receiving Christ's Holy Gospel as their rule of faith. They assert not a specific intention on her part to include Unitarians, but they deny the intention to exclude any particular sect from the advantages of a charity given generally for the benefit of Protestant Non-conformity.

It has been further contended, that Unitarians are not entitled to participate in the benefits of this charity, because Unitarianism always was and still is contrary to the common law, as it involves a denial of the Trinity. There is, however, no precise authority to be found for concluding, that to deny the Trinity is an offence at common law. Lord Eldon, after con-

¹ Short-hand writer's Notes.

sidering the question at some length in the case of "*The Attorney-General v. Pearson*,"¹ appears to have been unable to come to any conclusion.² He seems, however, to have been satisfied, that if it was so, it was so as being blasphemy.³ Now blasphemy has undoubtedly been always an offence at common law, unaffected by the enactment or repeal of statutes. But it is held to be such an offence only, as tending to subvert or disturb the security of civil society.⁴ With regard to denial of the Trinity therefore, there seems in reason a distinction to be taken, depending on the mode in which it is done. To rail and scoff at the Divine Persons, as it tends to affect the peace and comfort of the community, may undoubtedly be prosecutable as blasphemy. But the simple argumentative negation of the doctrine of the Trinity, as being sanctioned by reason or Scripture, has no such evil tendency. And this is all that Unitarians would claim to have the liberty of doing. It cannot therefore be considered that Unitarianism in itself is against the common law, although a member of the sect avowing his peculiar opinions in a violent and indecent manner, might render himself liable to prosecution, as the Rosendale Cookites for example, with whose alliance the defendants in this case have been so much taunted; who are stated to have talked in their application for relief from the charity, of "casting that ancient piece of orthodoxy (the doctrine of the Atonement) to the moles and to the bats." The remark of the Solicitor-General is one of great weight upon this point. "I take it," said he before Lord Lyndhurst, "upon me to affirm that it has been decided by this case that there is nothing unlawful in preaching Unitarianism at common law, namely, by the order of the Vice-Chancellor to Mr. Wellbeloved and others to answer upon oath as to their religious belief, confirmed on appeal by the Chancellor, for otherwise that was the grossest injustice to make a man criminate himself."

Considering it for the present as established, that a charity, created as this was, though benefiting Unitarians, has a lawful purpose at the present time, the next inquiry is, whether the intentions of Lady Hewley, so far as they are ascertainable from

¹ 3 Mer. 353.

² Page 408.

³ Pages 399, 407.

⁴ See notes to *Attorney-General v. Pearson*, pp. 383, 385.

her expressions, can be taken to include them? The sole words in her deeds, which at all relate to matters of doctrine, are in the trusts for "poor and godly preachers of Christ's Holy Gospel," and "for promoting the preaching," and for the "education of young men to the ministry of Christ's Holy Gospel." Notwithstanding the zeal of Mr. Walker, an Independent minister at Manchester, induced him to answer on oath that "the idea of godliness would not, and could not, have been attached to any but those who believed the doctrine of the Trinity," it is admitted, on all hands, that "godly" had originally not a doctrinal signification, but that godly preachers and dissenting preachers were, in Lady Hewley's time, pretty nearly convertible terms. It was a title, as Lord Brougham observed, at first imposed by the cavaliers in scorn to designate the "righteous overmuch." After the passing of the Act of Uniformity, it was probably more specially applied to the Nonconformists; and, after the Act of Toleration, to the ministers who declined subscribing to the Articles. On that phrase no argument can then be founded, as to the particular belief of Lady Hewley. Nor can there upon the expression of "Christ's Holy Gospel," as she nowhere indicates, in either deed, what her views of that Holy Gospel were. But, in the appendix of Rules and Orders to the second, some clue is afforded to her religious opinions by the injunction, that "every almsbody be one that can repeat the Lord's Prayer, the Creed, the Ten Commandments, and Mr. Edward Bowles's Catechism." As it is no very bold inference to draw, that the doctrines contained in these compositions were in accordance with her own—in the words of Mr. Baron Alderson, that they were what she considered fundamental—an inquiry into their nature becomes requisite. Two of them, being portions of Holy Writ, are of course unanimously held in honour and belief by all sects and denominations. Unitarians must also be considered as subscribers to the Apostle's Creed; for though Mr. Derbishire, who is a secretary at Manchester College, does certainly state in his answer that they hold the three creeds unscriptural, they have admitted this into their *Book of Common Prayer*,¹ with the very trivial alteration of a comma, the omission of the word "Catholic" as ambiguous,

¹ See Clarke's Liturgy.

and the "Communion of Saints" as papistical. But as Bowles's Catechism contains an exposition of Christian doctrine, as the relators assert, totally opposed to Unitarianism, and as they have thought the fact of so much consequence that the depositions on their part, as to its meaning, extend to about five hundred folios, it is necessary to examine its contents.

Were we to take the opinions of noted Independents on this subject from their answers on oath, we should have to conclude that this Catechism is, as Dr. Pye Smith says, undoubtedly a "Trinitarian one" ("racy with Trinitarianism," in the jovial phrase of Mr. Bennett); and "plainly excluding such persons as Unitarians from salvation;" that it is "framed to correspond with the Assembly's shorter Catechism," which contains definite and unmistakable assertions of Trinitarian and Calvinistic doctrine; and that it asserts the eternal Deity, Incarnation, and permanent Union of the divine and human natures in the Saviour. We learn from Unitarians, on the other hand, that "the sole point, in which they dissent from Bowles, is in his statement of the doctrine of Original Sin." It is for eyes sharpened by religious controversy to find out what this document may contain by implication, but any reader may ascertain, without fear of contradiction, what it does, or does not, contain in words. Briefly, then, it has no description of the Saviour other than that he was "*the Son of God* manifest in the flesh," and it is worth noting, that the reference in the margin, by which this answer is supported, is to 1 Tim. iii. 16, where the words of the common version are, "Great is the mystery of godliness, *God* was manifest in the flesh;" so that there seems here almost a studious avoidal of asserting in express terms the Deity of Christ. It nowhere affirms the Holy Spirit's distinct personality. It contains no doctrine of Predestination or Election. Whether the orthodox view of the Atonement is to be found therein, depends upon the meaning we give to words susceptible of more than one; but, assuming that it is, it must be owned that the expressions employed are such as any Unitarian might subscribe to, giving to them his own sense, whereas it would have been just as easy to use a mode of expression incapable of such misinterpretation, as that, for instance, in the shorter Catechism of the

Assembly, the popular one in Bowles's time: Without wishing to censure either party, we own it is to us quite unintelligible how any warmth of zeal, any sense of the importance of the point, could induce men of piety and education to assert of such a doctrineless composition as Bowles's, that it is framed to correspond with one, that in terms, as clear as language will admit, affirms the doctrine of the Trinity, as plainly as the Athanasian Creed—affirms the whole orthodox statement of the nature and offices of Christ and the Spirit—affirms the doctrine of Election, and, as we have said, of the Atonement. Mr. Baron Alderson, indeed, has said, that although some of these are controverted questions; still; on uncontradicted evidence, he thinks the doctrines enumerated in the Vice-Chancellor's declaration—meaning those of Original Sin and the Divinity of the Saviour—are contained in Bowles's composition. We are at a loss to understand in what sense uncontradicted, one of these conclusions being stoutly denied in the defendant's evidence; namely, the Divinity of Christ in the sense of Deity; in which it is used throughout his judgment. Lord Lyndhurst, with more caution, abstained from asserting, as his own opinion, that more than the doctrine of Original Sin was to be found there.

It was observed by the Vice-Chancellor; and the observation itself proves how little directly to the same point can be found in this Catechism, that, because it speaks of the infinite love of Christ, it of necessity conveys the notion of his divinity, for none but a divine being can love infinitely: Omitting, for the present, the objection, that divinity and deity are not identical terms, we are quite at a loss to comprehend the proposition here laid down; that none but divine beings are capable of infinite qualities. On such reasoning a rival metaphysician might affirm the divinity of his Honour's self; for if that faith, of which he sought to give such zealous proofs, be, as our Church instructs, the Scriptural and saving one, does not he hope for the enjoyment of infinite happiness hereafter, and that, too, for an infinite period? Infinite is itself a term of very unsettled meaning, as often signifying that which has no ascertainable limits, as that which has no limits whatsoever, and is applied frequently to human creatures and human qualities in works scarcely less serious than a catechism.

If this short view of the contents of Bowles's work be correct, they can afford but a poor guide to Lady Hewley's peculiar tenets. One inference, however, is allowable. Not that Mr. Bowles or Lady Hewley thought this Catechism contained all the doctrines of Scripture—not that both were not Trinitarians, or even Calvinists—but that they did hold it to contain all doctrines essential to salvation; in other words, that they did think a saving faith might coexist with wrong or imperfect notions of Election and the Trinity. He would scarcely frame, she scarcely recommend, a statement of belief insufficient to that end for which belief is enjoined upon mankind—their own salvation—although both might employ a work omitting many of their own tenets, for the sake of simplicity and brevity. Attached to the principle of the right of private judgment—the Presbyterian principle, as we shall presently show, it might be entitled in the time of Lady Hewley, and relying on the all-sufficiency of Scripture, they were contented with a creed expressing no more than the chief doctrines explicitly declared therein, omitting those which, however clearly to be implied or inferred, were nowhere so directly stated. But the argument that Lady Hewley adopted this Catechism for its shortness, (and we are assured by Mr. Romilly, who, in his own phrase, folio'd it, that it is four-fifths shorter than the lesser one of the Assembly,) cannot be strained the length of proving, that so excellent and pious a person would, for such a reason, enjoin on the objects of her temporal bounty the use of any work deficient, or even obscure, upon what she esteemed cardinal points of religious faith. At the thought of such a betrayal of their best hopes she would, indeed, have "shook with horror." The fact, as it stands, must be taken to be rather illustrative of the general liberality of her notions, and her indifference to sectarian distinctions. And these feelings are further evidenced by another of the "Rules and Orders," requiring that "all the almspeople duly repair to some religious assembly of the Protestant religion," without any restrictive proviso as to the doctrine or discipline of such assembly.

It has been said that Bowles's Catechism contains a clear, though not precisely orthodox statement, of Original Sin, which Unitarians reject. But it will hardly be contended that Lady

Hewley, as a believer in that doctrine, must be taken to intend excluding Unitarians merely on account of their disbelief of it, notwithstanding the weight given by Lord Lyndhurst to the fact. Such a notion would ascribe far more importance to this article of faith than was ever attached to it by any sect of Christians. It has been rejected by those otherwise most orthodox—received by those otherwise most heterodox. Firmin, perhaps the most noted Unitarian cotemporary with Lady Hewley, was a believer in it, as we gather from his life;¹ whilst Taylor, one of the greatest ornaments of our Established Church at any time, has himself proclaimed his disbelief;² and the thoroughly orthodox Bishop Tomline considers the difference immaterial “between those who confine original guilt to a mere liability to death and sin, and those who extend it to a liability to punishment also.”³ The difference, such as it is, was perhaps never better illustrated than by Lord Brougham, though somewhat irreverently too. “Original Sin,” said his lordship, “according to the Unitarian notion, is something merely executory, whereas, by the Calvinistic doctrine—that is, the doctrine of our Church—it is something actually executed by reason of the transaction of our first parents.”

Having exhausted the evidence afforded by the contents of the deeds and appendix, without seeing much reason to surmise that Lady Hewley meditated excluding persons of Unitarian sentiments from participation in her charity, we are still so little informed respecting her opinions and wishes, that the next step must be to search elsewhere for some key to them. It might be, indeed it has been, contended, that such a course is improper in a case like this, where the trusts are so simply worded, as militating against the recognised principle, that, if the language of the deed have a clear, or even probable meaning, a court of equity will not inquire the intention, in the phrase of Attorney-General v. Bradley, “will not make an intent for the founder.”⁴ The Solicitor-General went so far as to affirm, before Lord Lyndhurst, that, if Lady Hewley had elsewhere said that she held Unitarians in horror, you could not go out of the words of the deed. This was,

¹ Firmin's Life by Cornish, p. 47.

² Sermons, p. 437.

³ Christian Theology, vol. ii. p. 241.

⁴ 1 Ed. Rep. 487.

however, an answer forced from him by one of the numerous questions poured in by the Chancellor and Mr. Baron Alderson during his address, which gave him the appearance of a witness under cross-examination rather than an advocate, and materially impaired the efficiency, though not the temper, of his argument. It must, therefore, hardly be taken as the learned gentleman's deliberate opinion. There is not much direct authority on the point; but, in the case of *The Attorney-General v. Pearson*, where the words of the trusts were as simple as in the present case, Lord Eldon directed a reference to the master to inquire the object, as regards worship and doctrine, for which the charity was created.¹ To such a reference Lord Brougham expressed an opinion that the present disputants must ultimately come, when the impracticability of arriving at any result would become manifest, and, upon the uncertainty being made apparent, the Attorney-General would step in for the crown. He failed, however, in bringing the parties to an amicable settlement by this appeal to their fears, although he said this was the view of "authorities in the House of Lords;" and the notion has been since quite exploded by the decision of Lord Lyndhurst and his colleagues, that at any rate this was clearly a trust for some dissenter's benefit. The case has thus been mainly argued on intention, as collected from external evidence, with so much amplification and research, that it seems to us at least a probable solution of the wishes of the foundress has been attained. What that is we now proceed to consider.

Of the life and actions of Lady Hewley herself little further has been ascertained than what is already stated. It appears that, in early life, she was an acquaintance of, and probably an attendant on, the ministry of the author of the much-controverted Catechism, who resided and preached at York until his ejection from the church, under the Act of Uniformity, in 1662. He died upon the day when that act came into operation. That he was himself a Trinitarian and a Calvinist, may be gathered from a sermon delivered by him in 1648, wherein he complains of Arminian and Socinian sentiments "stepping in at the back-door of the church." At the same time, there

¹ 3 Mer. 420. This case was again revived last year under the name of the *Wolverhampton case*, and is not yet finally disposed of.

exists no evidence of his being of an intolerant temper ; while the contents of his Catechism, and a declaration in his last illness that he disliked the whole of conformity, seem at least to afford an inference that he was averse to the imposition of human creeds upon Christian professors. But the latter part of Lady Hewley's protracted life was passed in attendance on the preaching of Dr. Coulton at St. Saviour-gate, who is characterised as a " liberal divine" in the " Life and Errors of John Dunton, 1706," and was in all probability a Trinitarian. It was he who preached this lady's funeral sermon on her death, in which, (for the manuscript is preserved,) with a very warm and eloquent eulogy upon her virtues, is coupled a very distinct statement of her belief in the unprofitableness of good works, and her sole reliance on the Atonement to justify and save her. That these were her sentiments is farther manifest from her own will made in 1707, soon after the date of the second deed, in which she commits her soul to her Redeemer " to be washed in his blood." Calamy himself, a noted Presbyterian divine, and the grandson and biographer of the famous Richard Baxter, was another friend of Lady Hewley's, and honoured with particular marks of her esteem ; he was a Trinitarian, but not a Calvinist. There is evidence to show, also, that some of her trustees were Trinitarians. And this is all that has been preserved of Lady Hewley's life and associates, excepting that some instances of her Catholic spirit in charity are extant—as her zealous aid to the Archbishop of York and his wife in the foundation of schools, and her placing the distribution of a sum of money, given by her for coals to the poor, in the hands of the corporation of York, although Dissenters were excluded from it by law. From these premises, then, no further inferences can be deduced, than that she was a Trinitarian, or, at the least, a devout believer in the orthodox view of the Atonement, but whether a Calvinist, or not, does not appear ; that, as a believer of those doctrines, and one whose deep sense of religion is so fully evidenced, she was likely to require from the participators in this charity the same belief, though the probability of that is somewhat lessened by the fact, that she did not require the objects or distributors of other charities to be of her own religious opinion.

On such imperfect proofs one might perhaps have presumed no court of equity would pronounce persons of Unita-

rian opinions excluded. But it may be that additional proofs are to be found in the history of those times. If it can be shown that Unitarianism was then a thing unknown, or so obscurely hidden, that it was quite impossible for Lady Hewley to anticipate that its followers would ever be in a position to lay claim even to a share in her charity, then her neglect to exclude them in terms, is no argument that she would have tolerated their admission; or if it can be shown that all the Presbyterians of her day were strictly united and agreed upon all points of religious faith, deniers of the name of Christians to all who did not subscribe to the same, approvers and inculcators of tests of true belief, persecutors and revilers of those who refused subscription to them, the inference which, as far as Lady Hewley's life and language are concerned, seems weak, might be strengthened to a degree justifying, nay demanding, the interference of a court of equity. It is expedient, therefore, in order to come to any fair conclusion, and the inquiry would otherwise be highly interesting, to examine into the historical progress of the polity and opinions of different religious sects in England, of the Presbyterians more especially.

It is needless to inquire, perhaps impossible to ascertain, how soon after the Reformation the errors of Unitarianism began to be disseminated in England. Two of its professors had, however, the honour of being the last though not the greatest of our English martyrs, and were burnt in 1611, duly according to the statute *De Heretico comburendo*, by that wisest of princes James the First. It must not be supposed that this was an honour specially conferred upon them on account of the enormity of their heresy, for Edward the Sixth had previously treated Baptists, and Elizabeth, Independents, after a similar fashion. In fact, the Protestant Church of England, in its infancy, was no whit more tolerant of schism than the Romish Church that had preceded it, and not much less so than the still younger Presbyterian Church which for a time succeeded it as the dominant religion. It was during the supremacy of the last that an ordinance was passed in 1648, (Unitarian opinions being then rife,) making it felony to deny the Trinity, the Incarnation, or the Atonement. In practice, however, it does not seem that this ordinance was

ever enforced. Even Biddle, a most notorious and noisy propagator of Unitarianism during the latter years of Charles the First and through the Commonwealth, underwent nothing worse than imprisonment. Cromwell, indeed, who was far too much a statesman to be a persecutor, set him at liberty altogether when the Long Parliament was dissolved, and when he again caused disturbances, got him out of the country on a pension. After the Protector's death, he set up a conventicle in London, which prospered till the return of Charles the Second, and restoration of the Establishment, when he was again thrown into prison, and shortly after died. From the testimony of his enemies, he left a high character for talents, morals, and learning.

Another eminent Unitarian, already mentioned, by name Firmin, flourished in the church itself at the time of the Revolution. He was the intimate friend of Fowler, Bishop of Gloucester, and excited the sympathy of Queen Mary so much by his character and charities, that she requested Archbishop Tillotson to set him right on his errors if possible. It has been argued by a witness for the relators, that his not separating from the church, on account of these sentiments, shows how pure from similar doctrines the dissenting body at the time must have been. Had Firmin been originally a dissenter, and acceded to the church upon adopting heterodox notions, such an argument might have great weight, but there seems nothing requiring explanation in his continuing to belong to the church he was brought up in, as long as she forbore to cast him off. Of Firmin, Lady Hewley must undoubtedly have heard, and it is from the later part of his life that the general circulation of Unitarian tracts throughout the country is to be dated. We find from the report of Mr. Cooper's Speech, that upwards of fifty controversial pamphlets on the doctrine of the Trinity alone, were published between the years 1690 and 1704, the date of Lady Hewley's first deed, a number perhaps as great as has appeared on the same subject in any period of fourteen years since. It is unquestionable also, that the "Act against Blasphemy and Profaneness" was called forth in part by the alarm the more severely orthodox felt at the spread of Unitarian writings and doctrines, and it was in 1702, just before these charitable

dispositions, that the celebrated Emlyn, a Presbyterian divine, convert to Arian sentiments, was fined and imprisoned under it. Now it is quite impossible that Lady Hewley, as a sensible and pious person, interested in religious discussions, could have lived on the margin of such a sea of controversy as this without being fully conscious of its roar; nor could the talents and celebrity of Emlyn have failed to attract the notice of herself and her advisers. She could not but be aware that Unitarianism was abroad and increasing, notwithstanding the prohibitions of the law; and that it was gaining converts from other persuasions, notwithstanding the denunciations of the orthodox. She must then have been alive to the fact, that under the terms of her foundation-deeds, expressed, not in favour of Trinitarians, but of "godly preachers," persons denying the doctrine of the Trinity—persons like Emlyn, styling themselves godly preachers and Presbyterians, (whether rightly or wrongly matters not), might succeed in usurping and enjoying the advantages of her charity, unless debarred by law. That being alive to this hazard, she did not, as an orthodox Trinitarian, make a profession of belief in the Trinity a condition precedent to the participation in her bounty, may seem strange to some at first sight; but can it not be fully accounted for by the progress in liberality and toleration, carried perhaps to a blameable excess, which many Presbyterians in her time had made?

The history of no religious sect affords more striking illustrations of the insolence of a triumphant or the gentleness of a suffering church, than that of the English Presbyterians. And perhaps none more strikingly exhibits a rapid transition from one form of discipline or mode of doctrine to another very different. It is only in the silent lapse of three centuries that the now Arian Church of Geneva has slowly and gradually deviated from the stern pure orthodoxy of its founder. The Church of England, during most of the same period, has oscillated gently between the confines of Calvinism and Arminianism, without touching the extremes of either. At the end of the seventeenth century many of her dignitaries were Calvinists; at the end of the eighteenth, Lord Chatham sarcastically described her as a church with Calvinistic articles, a Popish ritual, and an Arminian clergy,

whilst the great head of the church himself might at that time be seen setting an example of heresy to his faithful subjects, by refusing to respond or even stand, during the reading of the Athanasian creed. In the present day, the inferior clergy at the least again manifest a pretty general tendency toward Calvinism. The Presbyterian Church of Scotland now differs little and has never differed much from that founded by John Knox. But the Church of Presbyterians in England, as regards a considerable fraction of its members, within the compass of one hundred years was ultra-Calvinistic and Arminian, Trinitarian and Arian, a requirer and a rejecter of religious tests; an imposer and an opposer of creeds; an approver of a general system of discipline, based upon synods and assemblies, and a collection of isolated congregations, distinct as those of the Independents from each other. It is this variety, both in the outward form and inward spirit, that has given rise to one of the chief difficulties in the present case, both parties professing to give a true description of the practice and opinions of the sect, on which they found their notions of Lady Hewley's own religious views, and yet presenting statements only reconcilable, if at all, by considering them to relate to distinct epochs of history.

The name of Presbyterian in England for the first time became great and formidable in the troubled reign of Charles the First, when it began to be applied to the great body of those persons, who from their austere morality and religious fervour had been designated by the title of Puritans for some time previous. These men dissented not from the doctrine but the discipline of the church, and could willingly have endured the Articles, but revolted from prelacy, with its attendant train of pomps and ceremonies, as altogether popish and unchristian. With the fall of the king fell the Establishment that had clung to his cause, and Presbyterianism in a few years became the dominant religion of the country, and took possession, by right of conquest, of a large proportion of benefices and endowments. During the short period of its power considerable progress was made toward the establishment of that system of church government from whence it takes its name, by the formation of classes, and synods, and assemblies of elders, and the whole was legally ratified by an

ordinance of Parliament in 1648. The leaders of this church appear to have been thoroughly orthodox and thoroughly intolerant. They drew up the two confessions of faith in 1643, called the Assembly's Longer and Shorter Catechisms, in each of which all the peculiar views of a Calvinistic Trinitarian were explicitly and rigorously set forth, and by ordinance and declaration they forbade the practice and denied the propriety of toleration. But their power was of short duration. A bolder, a freer, and at that time a far more tolerant sect, whose addition of Independents involved their distinctive principle of rejecting *all* systems of church government, but whose doctrines differed little if at all from those of the then Presbyterians, began to appear in formidable numbers. They had rested in insignificance until the downfall of Episcopacy, but in the tumult and excitement of universal change, their religious radicalism, if we may so term it, suited far better an overheated nation than the half-reforming, half-aristocratic new establishment. With Cromwell at their head, their triumph was speedily achieved; a system of toleration almost universal was propounded, and the lately tyrannous Presbyterians were reduced to moderation and forbearance. Yet, as the nature of Independency itself was incompatible with the enjoyment of religious endowments, its professors appear to have left their rivals in possession of the various benefices they had pre-occupied, and contented with depriving them of their power as a church, generously forbore to take from them their wealth also. But it is from the time of this triumph of Cromwell's political and religious faction, (for both events occurred contemporaneously,) that we must date some advance in liberality, and some relaxation in discipline and doctrine among the Presbyterians. With the loss of the power they seem to have lost something of the disposition to persecute, and from the period they were no longer able to impose their creed on the nation, some of them seem to have begun to entertain doubts as to the propriety of any such imposition. Many of the divines who at this period began to rise into eminence among them, were neither so harsh nor so orthodox as those fathers of their church who framed the famous catechisms. Such, for instance, was the noted Richard Baxter, who was born in 1615, and had attained

great eminence in the Presbyterian Church at the time of Charles the First's execution,—indeed, may be considered to have been its leader from that time till his death in 1691. On two most important points, one of doctrine and one of discipline, he differed from the older divines. As to the former, he was not a Calvinist, but adopted and published opinions about equally removed from the extremes of Calvin and Arminius, so that his view came to be called "Baxterianism," or "The Middle Way," and those Presbyterians who adopted it were styled, for distinction's sake, "Baxterians." As to the latter, he was the avowed enemy of the imposition of creeds and tests of faith, as conditions for belonging to a Christian church. Thus, speaking of the committee appointed for defining fundamentals at the beginning of the Protectorate, he says, "We would have had the brethren to have offered the Parliament the Creed (i. e. the Apostle's), the Lord's Prayer, and Decalogue, as essentials or fundamentals, which at least contain all that is necessary to salvation." Then follows a remark, important in itself, more important in relation to our case. "And whereas it was said, 'A Socinian or a Papist will subscribe all this,' I answered, 'So much the better and the fitter to be a matter of concord.'" It must be acknowledged on all hands, that when Baxter and his followers avowed such sentiments as these, they at least had taken some steps toward heterodoxy, and more toward universal toleration.

The death of Cromwell gave a vital blow to the ascendancy of the Independents, already impaired in their consequence as a religious body by subdivisions into numerous frantic sects, headed by deluding or self-deluded fanatics. So that we find them, to our surprise, shortly after the Restoration, shrunk again to a minority small in numbers and importance, whilst the greatness of the Presbyterian body is sufficiently evidenced by the fact, that the passing the Act of Uniformity drove from the possession of the dignities and emoluments of the Church nearly two thousand ministers, who refused to purchase the protection of that statute by complying with the condition it imposed of declaring their assent to every thing contained in the Book of Common Prayer. That so vast a body of divines were found ready to sacrifice all tem-

poral advantages, or expose themselves to future persecution for conscience sake, fully proves that they and their congregations must have still retained the pure piety and morality of their fathers ; but that they had lost much of the antipathy of the latter to prelacy and its attendant abominations is established by the proceedings at the Savoy Conference between twenty-one Episcopalian and twenty-one Presbyterian divines the year before, for effecting, if possible, a union of the two churches, when the representatives of Presbyterianism declared their willingness to acquiesce in a moderate Episcopacy. Indeed, from this time, an indifference to matters of discipline began to prevail amongst them, and they made little farther attempt even after they became tolerated by law, to revive any general system of church government by means of assemblies and synods. The name of Presbyterian was, however, retained, without the reason for it, and from the Restoration secretly, and after the Revolution openly, dissenting chapels so entitled were founded throughout England.

The sufferings of the Presbyterians under the oppressive laws of Charles the Second, during the reigns of himself and his successor, however interesting in themselves, are not material to the present question. It is more than probable, that during this trying period of sixteen years, persecution was teaching them liberality. Doubtless the peculiar sentiments of Baxter, now their leading writer and teacher, were making considerable progress. Upon the coming in of King William, and the passing of the Act of Toleration, which speedily followed in 1689, the immediate effect was to cover the land with a thousand meeting-houses, called Presbyterian, yet unconnected with each other. The Presbyterians, however, were not satisfied, for the toleration was not complete, all preachers being required to subscribe thirty-five articles and a half of the church of England, being the whole of their doctrinal, as separate from their disciplinary contents, and not to deny the Trinity. Lord Lyndhurst has remarked, that it is well known the Dissenters were consulted in framing this act, a fact not to be disputed ; but his conclusion therefrom, that they "were satisfied generally with its provisions," is strikingly at variance with the declarations of cotemporary

writers. The pretty general refusal or neglect to make the requisite subscription, although the doctrines of Presbyterianism at the time could hardly differ from those of the church, (except in so far as laxer notions on Predestination and Election were growing up,) is some argument that a dislike of all tests and human creeds prevailed at that time among the refusers. The non-subscribers, whose conduct seemed obdurate and ungrateful to many liberal persons, were anxious to improve their position by a union with other dissenters; and the Independents, weak in numbers, now eagerly desired the same. But when the consideration of its practicability came under discussion, it was found that in addition to the old difference of discipline, to which much less importance was attached than formerly, a difference in doctrine had grown up. It was, therefore, thought desirable, in 1691, that some "heads of agreement" should be drawn, embracing what was common to the faith of both, as neither was willing to make any sacrifice of conscience for the sake of the advantages to be derived from union. These "heads of agreement" are clearly Trinitarian and Calvinistic, for they adopt the Assembly's Catechism; and as we may conclude that at least half of the framers were of the Presbyterian denomination, the inference is irresistible that many of those were still Calvinists, notwithstanding the influence of Baxter and his followers. It is singular that Lord Lyndhurst, who in his judgment laid great stress on this proof of the general orthodoxy of the Presbyterian church at that epoch, suffered the fact to escape his recollection, that this ill-starred union lasted but three years, and was then dissolved of necessity from the differences between the sects on points of faith proving too great to admit of concord. The one party charged Antinomianism, the other Arminianism on its opponents; and, from the year 1694, a very decided animosity prevailed between them. In addition to their contrary views of the peculiar doctrines of Calvin, a difference began to prevail as to the propriety of requiring subscription to any creed from communicants, before admitting them to partake of the sacrament. Some distinction there was also as to the requirail of a profession of faith from future ministers, previous to their ordination; but at what time the Presbyterians quite laid

aside this practice is not clearly ascertainable. It existed, however, though gradually declining in strictness, in some places at least, until the year 1740. And this fact seems to furnish the strongest argument against the Unitarian claim, for it is certainly fair to urge, that if the "poor and godly preachers of Lady Hewley's time and sect were subjected to a confession of faith embracing all doctrines of importance," she had no reason to apprehend that Unitarians would come into the ministry, and, therefore, no inducement, however great her disapprobation of their creed, to exclude them by language more express from the benefits of her bounty, in so far as she extended it under these deeds to dissenting ministers, though her other dispositions are in no way affected by this fact.

But there is abundant evidence to show that this practice, though existing long after Lady Hewley's death, was not universally, nor even generally, approved by the Presbyterian body within nine years from that event. It was, by this time, that the preaching of Arian opinions had become sufficiently general to alarm the consciences of the orthodox; and the case of Mr. Pierce of Exeter, who publicly impugned the doctrine of the Trinity, was considered by a general meeting convened at Salters' Hall, on the 19th of February, 1719. It was then and there proposed, that to prevent the further progress of heresy, a declaration of belief in the Trinity should be subscribed, and a subscription of faith on such points as were believed fundamentals in religion should be required from all ministers on ordination. After an animated discussion this was negatived, in a meeting of one hundred and forty-two persons, by a majority of four. The majority of those present were undoubtedly Presbyterians, but as many Independents also attended, and they must be taken to have been by this time almost unanimous in favour of subscription; the inference is irresistible, that considerably more than half of the Presbyterian persuasion, though themselves Trinitarians, were opposed to the imposition of any creeds or tests whatever. We thus see that the religious body going by the name of Presbyterian, who, in 1643, were unanimous for the promulgation of catechisms, containing the most precise statements of belief on every the minutest point of doctrine, had,

in less than eighty years, the greater part of them become indifferent or adverse to requiring from their members any declaration of belief upon points the most essential; a change surely as remarkable and rapid as history records of any sect of Christians since the earliest annals of the church. The consequences of this change of system were such as might have been easily foretold. Where there exists no established creed or articles of faith, there cannot long be much unanimity of opinion, on a subject of such vast extent and difficulty as the grand system of Christianity. Arianism, and many other not less important heresies, became common in the Presbyterian church. It was through Mr. Hotham, the assistant minister there in Lady Hewley's life-time, that Arianism was introduced into her own chapel of St. Saviour's Gate; not indeed by his personal preaching, but by his recommendation of Mr. Cappe as his successor, who was elected in 1656; and proved, as a preacher and writer, one of the most able and active promulgators of that heresy. In many other Presbyterian congregations similar results more early and coterminously took place. In all these the transition from Arian to Unitarian sentiments was afterwards easy and gradual, and thus many old Presbyterian congregations have been transformed into Unitarian ones; not by any violence, or usurpation, or intrusion, from without, rarely even by any severance into opposing parties within,¹ of which the stronger drove the weaker forth; but by the continual silent lapse of successive ministers and successive audiences, from one degree of error to another. Thus too the charitable foundations connected with such chapels passed into Unitarian hands, not by the force of strangers laying violent hands on the funds, and claiming to manage and enjoy them; nor yet by such law² as that whereby our Protestant church wrested their present possessions from the Catholic clergy, requiring them either to adopt the ritual of the new religion, or yield up their benefices; but by the slow and quiet change in the sentiments both of trustees and beneficiaries. Such is the case with Lady Hewley's bounties, the charge against the

¹ There is an allegation by the relators, that a large portion of Mr. Cappe's congregation seceded at once, but this is not made out in evidence.

² 2 & 3 Ed. VI. c. 1; 1 Eliz. c. 2.

trustees being not that they have fraudulently or forcibly usurped their authority, but that they have come to entertain religious opinions, which lead them to administer the charity improperly, nay more, which render them incapable of a proper administration.

The brief sketch we have given of the history of the English Presbyterians, the rapid changes they underwent, and the wide differences existing among themselves at the end of the seventeenth century, relieves the case at least from one unpleasant difficulty, arising from the utter contradiction of the statements of the two parties concerned, respecting the nature of Presbyterianism itself, which we must otherwise impute to dishonesty of purpose on one side or the other. The fact is, that each party has looked only at its own side of the Presbyterian shield of faith, which presents to the one the pure white of unstained orthodoxy, to the other the variegated hues of unrestrained liberty of conscience. Whilst the larger portion of the sect have melted away into the church, or other bodies of more settled creed and character, some portion has undoubtedly retained with the name of Presbyterian the doctrines embodied in the Assembly's catechism, whilst as undoubtedly another, and a larger portion, has fluctuated from Calvinism to Baxterianism, from Baxterianism to Arminianism, from Arminianism to Arianism, from Arianism to Unitarianism, their present state. Of these two portions the Independents would have the former, the Unitarians the latter, to represent the whole. Without submitting our belief to either, it is possible to form a decided opinion on the merits of the case.

It appears to us then that the defendants may claim a judgment in their favour upon one of two grounds. If it be considered, that from the evidence (of which so brief a summary has here been given) the intentions of Lady Hewley cannot be ascertained with enough certainty to warrant a Court of Equity pronouncing what they were, the Unitarians who at present possess nearly the whole administration, and a portion of the benefits of her charities, are entitled to retain their possession. For though her intentions may be doubtful, there is no ambiguity in her words. It may be open to the relators to show (if they can) what she intended by "preachers

of Christ's holy Gospel ;" but if they fail to do so, we can only understand it to include preachers of all sects who make that Gospel their rule of faith and practice, and amongst them Unitarians, however erroneous their view of its purport and doctrine may be. To do otherwise is to arrogate for human judgment infallibility in religious matters. Nor is it possible to overlook the mischief of substituting for the simple definition, that all may be called Christians who make the Gospel of Christ the foundation of their religion, the narrower one, that those only may be called Christians, who rightly understand the leading doctrines of that Gospel. The Unitarian is certainly the extreme case, but if the barrier of this simple definition be once broken through, and that too by judicial authority, we shall soon have theological partisans contending, and perhaps zealous vice-chancellors deciding, that other religious sects are not entitled to the name of Christians. It is indeed a well-known fact, that some of the more fervent sections of the religious community do not even now among themselves allow the Christianity of those who fall short of their own rule of faith. If then the intentions of the foundress of these charities be out of the question, it seems to us that the relators could rightly claim to dispossess the present trustees solely upon the ground of some fraud or irregularity in their appointment. For such, however, there is no pretext. According to this lady's directions, the trustees, from the beginning to the end, have gone on filling up the vacancies in their body by regular and (as it seems) unanimous election, with a single exception in 1760, when one trustee differed from the remaining six as to the eligibility of three more trustees who were then appointed.

Again, if it be considered, and this seems to us the real state of the case, that Lady Hewley's intent can be ascertained so far as to justify a Court of Equity in proceeding to act upon their view of it, we think (though it is difficult to strike a balance of such conflicting probabilities) that the Unitarians have made out their claim to have a judgment upon this ground also. But it will be urged, that Lord Lyndhurst, whose singular acuteness of intellect must render him pre-eminently capable of drawing the right conclusion in such questions, has expressed a different opinion—an opinion

which it would be presumptuous to contest. It is, however, possible to reconcile the opposite view with every word that fell from his lordship in Gray's Inn Hall. He terminated his inquiry with Lady Hewley's own religious sentiments, and contented with showing that her belief in the Atonement and the Deity of Christ was beyond question, he assumed, as a necessary inference, that she would not include those who differed from her on points of faith so very important. Now, it is the necessity, or even the probability, of this inference which Unitarians venture to dispute the more boldly, as his lordship attempted not any demonstration of it. Granting, say they, that Lady Hewley was thoroughly orthodox—granting that she was a Trinitarian, and if you please, a Calvinist, it in no wise follows that she designed to restrict her charities to such as thought alike with her. They make no absurd pretence that she would have particularly selected Unitarians as her beneficiaries, any more than Independents, who, as a sect, must, from their rivalry with the Presbyterians, have been odious to her, as far as any sect of Christians could be odious to so pious and excellent a person; but they say that she entertained no project of excluding either: and, in the large scope of her extended benevolence, would see both participate in her charity contentedly. Their argument is not that she did not love orthodoxy much, but that she loved liberty of conscience more, and that she esteemed no point of faith of higher value than the right of free inquiry, so that she scarcely would have preferred parties altogether opposing it to parties professing it, who had come to a result she did not approve. She preferred, like the Presbyterians of her time in general, a tolerance which might lead to what was in her opinion error, to an intolerance which should maintain what was in her opinion truth. Rather than prescribe the exact measure of faith which for all time to come should entitle recipients to her bounty, she ran the risk, not therefore perhaps a small one in her eyes, of benefiting some whose measure was but small. It was a choice between evils, and no more—between the evil of imposing tests or creeds by one to whom all tests and creeds were hateful, and the evil of promoting the preaching of heterodoxy by one sincerely and devoutly orthodox. But the former evil was certain and imme-

diate, the latter distant and contingent ; and she elected to impose no narrower limits on the enjoyment of her bequests, than the limits of Protestant dissent. Such is briefly the argument on the Unitarian side, supported by the evidence of Lady Hewley's liberal and unsectarian feeling in other matters, by the state of Presbyterian sentiment in her time, and above all by the glaring fact, that in the language of the trusts themselves, there appears no limitation. On the other side, the whole argument depends on the nature of Lady Hewley's own creed, and the extreme improbability that she could have reconciled to her feelings the idea of persons participating who differed from her on points of faith so vital as do the Unitarians. Between these two alternatives, as it is no question of law, each inquirer must decide for himself.

But it has been objected that speculations of this metaphysical nicety as to the intentions and sentiments of Lady Hewley, are unsuited to her era and character ; that it is not probable, from the position in society and the education of females in her time, that she indulged in, or was even capable of, such far-sighted calculations. Now, without praying in aid those brilliant cotemporary examples of virtue and true wisdom among her sex which threw a lustre on the seventeenth century, it is sufficient to remark on this, that the more we derogate from the capacity and knowledge of Lady Hewley, the more improbable we render it that in framing these deeds she acted without sufficient advice, surrounded as she was by pious and learned men. If, then, they were consulted on the subject, is it not still more improbable that they should not have suggested to her some forms of expression adequate to define and limit her bounty to the professors of her own creed, if such was her desire. These divines were surely conversant with all the forms of heresy, and could anticipate in some degree the probable variations of doctrine which might thereafter arise in the Presbyterian Church. And yet we must believe that they forbore from indifference or malice to guard by precise words the intentions of their friend, though so anxious to protect herself from benefiting schism and unbelief, and holding Unitarians in horror, as the relators say she must have done.

It is not to be forgotten that the defendants in this case,

like prisoners upon trial, are entitled to the advantage of every reasonable doubt in their favour. It is not necessary for them to make out that the balance of probability as to Lady Hewley's design leans on their side. If it be no more than a question of difficulty and conflicting evidence whether she intended to exclude them, a court of equity cannot be justified in wresting from them the participation in this charity, or the management, as they happen to possess it. The proof upon which they are ousted ought to be clear and satisfactory, the nature of the foundress's wishes ascertained almost to a certainty, before an eviction so severe both on the dispensers and receivers be enforced. Now whatever result may be come to by minds of various constitution as to Lady Hewley's probable intent, there is no one, whose perceptions are not obscured by prejudice, who can fail to admit that the problem cannot be solved to complete satisfaction, that there are weighty arguments on either side, arguments from the nature of the question not admitting confutation.

On the consequences which have followed Lord Lyndhurst's confirmation of the Vice-Chancellor's decree it is needless here to enlarge. The Independents, as was to be expected, are not suffered to enjoy their victory alone, but other classes of dissenters, who did not share the struggle, have come in to participate in the spoil, and nothing with regard to the disposition of these charities is definitively arranged except the total exclusion of the old possessors. But although this particular case may not be carried further, it is impossible that the question itself can be finally set at rest whilst so many other endowments, rich enough to disturb the consciences or excite the cupidity of the more orthodox dissenters, remain in Unitarian hands. For ourselves, we confess an earnest desire to see this or some similar case submitted to a solemn adjudication in the House of Lords; and notwithstanding the high authority which has already decided on it, we cannot but think it probable that a very different conclusion might there be come to. At any rate a matter of such consequence, both in itself and as a precedent for future decisions, seems to require and demand the consideration of the supreme tribunal.

S.

ART. V.—MERCANTILE LAW, NO. XVII.—MERCHANT SHIPPING
(continued.)

HAVING in the preceding number considered the obligations which concern the shipment of goods, we proceed, as was proposed, to examine, in the second place, those which relate to the carriage and delivery, or, in other words, the *duties* of the owner as a carrier for hire.

The principles by which, independently of special stipulation or positive regulation, an engagement of this nature is governed, have been already investigated in treating of the inland carriage of commodities,¹ and it may therefore be sufficient in this place to state generally, that, from the act itself of receiving goods on board to be carried for hire, the law implies an undertaking on the part of the ship-owner to use his best endeavours in conveying them to their destination and there delivering them safe and uninjured to the order of the shipper. He is not bound to warrant their safety against the risk of wreck or capture, and it is even doubtful whether he can be treated, like the inland carrier, as an *insurer* against all casualties, not proceeding immediately from the act of God, or the assaults of a public enemy.² What is required of him is, in the words of the law, "reasonable care and diligence." But this word "reasonable" is, if the expression may be permitted, an *elastic* term, varying in its import and extent with the exigency of the subject to which it is applied. The transport of commodities by sea is a service of much difficulty and hazard,

¹ Vol. vi. p. 429.

² We are aware that the famous judgment of Lord Holt in *Coggs v. Barnard*, 2 Ld. Raym. 909, is appealed to as establishing the doctrine that the owner or master of a ship is to be treated as an insurer; but there is nothing in that judgment which bears out such a proposition in its full extent, the exception to the general doctrine of *mandatum* being applied to the case of a common carrier. The cases contemplated by Lord Holt were those of owners of hoys, smacks, lighters, &c. plying within certain limits. The doctrine could, we apprehend, have no application to a vessel hired for a specific adventure. The cases of *Smith v. Shepherd*, Ab. on Sh. 252, and *Trent Navigation Company v. Wood*, id. 245, are of smacks navigating tidal rivers, and do not seem to have any application to sea voyages. In the preamble to the 26 Geo. 3, c. 86, the cases in which the master and owners are exempted from liability are stated to be "accidents by the king's enemies, the perils of the sea, or the act of God."

which he who undertakes must be supposed to have contemplated and provided against. He demands a proportionate remuneration, and is bound reciprocally to a proportionate exertion of skill and care; and inasmuch as all the precautions which enlightened prudence can suggest are not more than adequate to the occasion, it is scarcely too much to say that the owner would at the common law be accounted responsible for all contingencies by which loss or damage should accrue to the freighter except such as by *no* care or foresight could have been averted.

The result thus deducible from the nature of the service is however modified, if not altogether controlled, by the express engagement of the parties. By the law of England, differing in this respect from most other systems, a positive undertaking to do an act is not, as we have before had occasion to observe, excused by the interposition of the *vis major* or *casus fortuitus* rendering the execution impossible. Hence the necessity and the invariable practice of introducing into all charter-parties and bills of lading a special exception against the accidents of navigation. But as this exception in the form now in use comprehends all casualties of possible occurrence, and as no reservation however positive can dispense with the necessity of such a degree of care and diligence as the nature of the service requires, or exempt from the consequences of neglect,¹ the *general* effect of the express engagement is, to place the obligations of the owner on nearly the same footing as the law would have determined them in the absence of any positive convention. Bearing this in mind, let us consider the duties and liabilities of the owner in the order in which they arise.

First, as to the preparation for the voyage: There must be a sufficient vessel, sufficiently equipped. In every charter-party the owner or master covenants that the vessel shall be "tight, staunch, and strong, well furnished with necessaries and every way fitted for the intended voyage." If there be no charter-

¹ *Lyon v. Mells*, 5 East, 428. In that case the owner of public lighters had attempted by notice to exempt himself from all liability beyond a certain sum, but he was held responsible for an injury occasioned by the defective state of the vessels themselves. The rule, as applicable to the exception in a bill of lading or charter-party, has been often stated by the Courts and is well understood in practice. See post, p. 375.

party, but the ship is put up by advertisement on general freight, there is in this tender of the vessel for a particular service an undertaking necessarily implied that she is, or shall be, fit to perform the service.¹ In mercantile phrase a vessel wanting in any material requisite for the adventure is termed *unseaworthy*; and it is evident, first, that the unseaworthiness may be either in the quality or condition of the vessel itself, or in the defective state of its appointments, and secondly, that in both cases it is relative to the nature of the voyage, and the kind of cargo to be carried. Thus as to the quality of the vessel itself, a ship may be sufficiently good for carrying timber from the Baltic, which would be very unfit for bringing dried fruit from Smyrna;² and if a perishable cargo of this kind were spoiled by wet on its passage, the vessel would not be reckoned seaworthy merely because she was new or newly repaired, for the question would be whether she was *such* a ship and in *such* repair as to be fit for the service on which she was employed. Again, a vessel admirably adapted for a voyage to Calcutta may be altogether unsuitable for a trip to Quebec. She might, for example, with the loading which she had bound herself to take be too deep for the comparatively shallow water of the St Lawrence, and if in consequence of this unsuitableness she took the ground in the river, and the cargo were lost, she would be accounted unseaworthy, though in all other respects her condition were unexceptionable.

The same general criterion is equally applicable to the furniture and equipment of the vessel; for it is obvious that a different scale of arrangements will be requisite in long sea-voyages, and in the navigation of the inland seas—in peace, and in war—in an ordinary service, and in a hazardous and discretionary one.³

¹ *Lyon v. Mells*, ubi ante, per Lord Ellenborough.

² It is well known that vessels built at Sunderland and other ports on the north-east coast for the Baltic trade are never considered fit for the Mediterranean or West India trade. See the Report of the Evidence taken before the Select Committee of the House of Commons on Commerce and Manufactures.—Sess. 1833.

³ A good illustration of the general doctrine will be found in the case of *Wedderburne v. Bell*, 1 Campb. 1. The vessel sailed in time of war, and was lost in a hurricane. It appeared that a portion of her sails, useful for light breezes, was unserviceable. The loss was not attributable to this defect, but as the action was on a policy of assurance, in which seaworthiness is a warranty, it was made a ground of defence, and was held by Lord Ellenborough to be a sufficient one. "The hull

To be seaworthy then, the vessel must be sufficient for all the ordinary contingencies of the proposed adventure; she must be sound in her timbers, well caulked and tight, complete in her rigging and tackle; she must be amply furnished with provisions, water, and sea stores generally; she must have a competent master,¹ a full and efficient crew,² and, when requisite or expedient, a pilot for quitting or entering harbour;³ and lastly, she must be furnished with all the papers necessary for enabling her to sail to her destined port, or to secure her against seizure or detention; as the certificate of registry, charter-party, and bill of lading, the muster-roll of the crew, and the ship's articles, a manifest when required for importation, a bill of health when sailing from a suspected port, a licence when necessary for the legalization of the voyage, and the like.⁴ If, for the want of any of these requisites, loss or damage accrue to the freighter, the owner is liable to make it good, as well by the loss or abatement of his freight, as directly in an action for damages. But seaworthiness, though a positive undertaking, is not, in a contract of

of the ship," his lordship said, "was sufficient and seaworthy; but it appears that when she left Jamaica her sails were highly defective. *It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea: she must be rendered as secure as possible from capture by the enemy, as well as from the dangers of the winds and waves. Here the vessel appears to have been deficient in those sails on which her speed might materially depend.*" So also in *Tait v. Levi*, 14 East, 481, which was also an action on a policy, where the master from ignorance sailed into a port of Spain, which, *he ought to have known*, was in possession of the enemy, the Court held this to be such an incompetency as rendered the vessel unseaworthy.

¹ *Tait v. Levi*, *suprà*.

² *Forshaw v. Chabert*, 3 B. & B. 158.

³ *Law v. Hollingworth*, 7 T. R. 160; see also *Phillips v. Headlam*, 2 B. & Ad. 384.

⁴ The general rule is thus stated in *Ab. on Sh.* 225: "he [the master] must procure and keep on board all the papers and documents required for the manifestation and protection of the ship and cargo by the law of the countries from and to which the ship is bound, and by the law of nations in general, and treaties between particular states." The master or owner is bound to know what is requisite in this respect. If no licence be necessary, even a covenant to procure one will not make the owner liable in respect of a condemnation illegally made, on the ground that the vessel was not provided with a sufficient licence, the covenant being understood to apply only to a voyage for which a licence would be necessary. *Johnson v. Greaves*, 2 Taunt. 344; and see *Sifkin v. Allnutt*, 1 M. & S. 39; *Butler v. Allnutt*, 1 Stark. N. P. C. 222. The master must not carry simulated papers, except by agreement with the freighter.

affreightment, a condition precedent to the engagement of the freighter, or a warranty, in the proper sense of the word, the non-compliance with which may be made a ground for rescinding the contract altogether. If the service be performed, however defectively, the corresponding obligation of the freighter attaches, whatever were the condition of the vessel at her departure; he may demand compensation for injury actually sustained, and equity requires no more.

Suppose, however, that the defect to which the loss is attributable be one of which the owner alleges that he was really and *bonâ fide* ignorant,—some unsuspected rottenness, for instance, of the inner timbers,—is he to be visited with the consequences of this latent fault? In the case of an express covenant, such as that introduced into charter-parties, the answer is obvious: “it is so written in the bond;” and where there is no express undertaking, expedience and the law have equally decided in the affirmative. For, first, it is difficult to suppose that any such defect could exist unnoticed if that scrupulous care were exercised, which, in a matter so important, is reasonably exigible of the owner; and, secondly, the question ought to be viewed without reference to the conduct of the owner at all, and as a simple question of yea or nay, was the vessel seaworthy or not; because that it shall be so, “is,” to use the language of Lord Ellenborough,¹ “the foundation and immediate *substratum* of the contract,” a thing assumed by both parties at the time of entering into the engagement; and because no rule less strict would afford effectual protection against negligence in the performance of a duty essential to the safety, not of property only, but of life.²

¹ In *Lyon v. Mells*, *ubi ante*. See the judgment in that case in support of the proposition in the text.

² The Scotch law agrees with our's in this respect; for it has long been settled as an absolute rule, whether the defects were known at sailing, or secret and unsuspected, that “the hazard of leakage, and such ordinary hazards as occur, not by stress of weather, or any such extrinsic accident, but only from the ship and her furniture, lie not upon the merchant, nor are relevant to free the skipper, who must have his ship sufficient at his peril.” 1 Bell's *Comm.* 550. 4to. ed. Valin decides in like manner in his commentary upon the Ordinance, “La garantie du propriétaire du navire auroit lieu dès que par l'évènement il seroit vérifié que par des vices cachés il n'étoit plus navigable; c'est-à-dire s'il étoit constaté qu'il avoit des membres pourris, lassés, ou tellement gâtés, qu'il fut réellement hors d'état de résister aux accidens ordinaires des coups de vent et des coups de mer inévitables en toute

The undertaking of the owner is, that the ship shall be seaworthy *when dispatched*. She may cease to be so in a few hours afterwards, and yet the owner may not be liable. The practical difficulty is in determining, whether the disability is the result of a defect existing at the time of departure, or of some cause adequate to produce the effect which has occurred since the departure. In France it was an ancient regulation, (not however enjoined by the celebrated Ordinance, nor by the modern Code de Commerce, though it is still in some degree the practice,) that every merchant vessel should, before leaving her port of outfit, be inspected by official surveyors, who were to attest her seaworthiness by their certificate. It is admitted, however, that little benefit was derived from this regulation. It appears to have been frequently neglected altogether,¹ and the formal inspection, when made, was superficial and imperfect.² Even without this testimony of experience, it might well be doubted whether any such regulation ever could be made effectual, as at once a protection to the freighter, and a conclusive testimonial in favour of the owner.³ In England the attempt has never been made: when the question of seaworthiness arises by reason of loss or damage sustained, the law leaves it to be determined by a careful investigation of the cause and circumstances to which the accident is attributable; and though it is obviously impossible to reduce a question of fact so complicated to any precise or general rule, the *prin-*

navigation." And again: "Le propriétaire ou le maître demeure toujours responsable des vices intérieurs, et cela avec autant plus de justice qu'il ne peut pas ignorer le mauvais état du navire: mais quand il l'ignoreroit, il en seroit de même, étant nécessairement tenu de le fournir bon et capable de faire voyage." Com. on Art. 12, Du Fret ou Nolis. Pothier comes to the same conclusion, on the ground that there is a warranty in all cases of a chattel let out on hire. The rule is laid down without qualification in the Code de Com. thus, "Le capitaine perd son fret, et répond des dommages-intérêts de l'affrèteur, si celui-ci prouve que, lorsque le navire a fait voile, il était hors d'état de naviguer." Art. 297 is in substance the same as Art. 12 of the Ordinance, tit. Fret, which is equally unqualified.

¹ Pothier, *ubi ante*. "Néanmoins on nous a assuré que les visites étaient souvent négligées sur les côtes de l'océan, et qu'un grand nombre de navires partaient sans avoir été visités."

² Valin, *ubi ante*.

³ Valin says, "La garantie du propriétaire auroit lieu tout de même, quoique le navire avant son départ auroit été visité, et jugé en état de faire la voyage;" and assigns as a reason, that the exterior parts only are inspected. Pothier combats this opinion, but his conclusion practically amounts to the same thing.

ciple of the inquiry may be illustrated as follows:—Suppose a vessel soon after her departure to become leaky, without having encountered severe weather, or any extraordinary accident sufficient to account for the disability: it is clear that in such a case the presumption would be against the owner, and would demand the strongest evidence on his part to establish the seaworthiness. But suppose, on the other hand, that the vessel had been some time at sea, that she had met with severe gales, that she had been strained by labouring in a heavy sea; here there would be a proximate cause apparently adequate to produce the effect without any supposition of unseaworthiness, and it would be for him, therefore, who imputed it, to show that there was in fact an original insufficiency in the vessel itself, to which the injury might reasonably be attributed.

Secondly, as to the voyage itself: The vessel must “clear out” and commence her voyage within a reasonable period. It is the master’s duty to obtain the necessary documents for clearance from the officers of the customs, and to pay the port and other charges. When all is ready, he must sail as soon as wind and weather permit: to set out in tempestuous or dangerous weather would be an imprudence, for the consequences of which he would justly be held responsible.¹ In charter-parties there is frequently a positive undertaking, that the ship shall sail with the *first* fair wind after a certain date, or after the completion of her loading; and if this undertaking be not strictly performed, the owner will be responsible for any injury which the freighter may sustain by the delay; though if the voyage were afterwards accomplished, the default would furnish no answer to the claim for freight.²

¹ Most of the ancient sea ordinances require that in doubtful weather the master should consult his officers and crew as to the propriety of setting sail. In Balfour’s *Sea Laws*, the rule is thus stated, “The master should ask counsel at his fellowes in making of sail, and gif some of them sayis that the weddar is gude, and some sayis the contraire, the master should accord with the maist pairt; and gif he does otherwise, and ocht cum to the ship bot gude, the master sould pay the skaith gif he has quhairwith.” 1 Bell’s *Comm.* 554, (n. 3.) The rule still prevails in France, (see Pardessus, *Dr. Com.* 632,) and is applicable, not only to this case, but to all matters of doubtful expediency.

² According to the general principle that the objection goes only to a *part* of the consideration. *Constable v. Cloberie*, Palmer, 397; and see 4 East, 477; 1 Wms. *Saund.* 320, (4). The day named for sailing constitutes, in a policy of assurance, an express warranty.

2. In time of war it is a frequent stipulation that the vessel shall depart with convoy, and in the two last wars, as has been already stated, it was made by the legislature a compulsory regulation. When thus required by law, it is evident that the duty becomes imperative even without an express undertaking, although non-compliance with the regulation would not, perhaps, constitute such an illegality as to bar the claim for freight, if the loss of which the merchant complained were not attributable to this cause. And although in the absence of any legislative ordinance, the undertaking would certainly not be deemed a warranty, or condition of the contract, yet if the merchant were to lose the benefit of his insurance,¹ or sustain any injury by reason of, and as a direct consequence from, the breach of this engagement, there can be no doubt that he would have a right to indemnification from the owner.²

In terms the undertaking is that the vessel shall *depart with* convoy. It is sufficient however that she sail with convoy from the appointed place of rendezvous,³ so that if she be lost in sailing from her port of loading to the place of rendezvous, the engagement is not broken.⁴ On the other hand, it is not sufficient that she should merely *set out* with convoy: she must, if possible, continue under its protection throughout the whole voyage.⁵ Storms or other unavoidable accidents may separate her, but there must be no fault on the part of those by whom she is navigated.⁶

The convoy must be the particular naval force appointed by the government or the commander of the station for vessels proceeding to that destination.⁷ If there be convoy to the specific port for which the vessel is bound, that convoy must be taken; if not, it is enough that she put herself under the protection of the force indicated officially for vessels so bound.⁸

It is the duty of the master to obtain, before his departure, the sailing instructions delivered out by the commander of the convoy. Indeed, without this, he can scarcely be considered

¹ In a policy, it is a warranty.

² 4 Campb. 54 (n.)

³ Salk. 443; 2 Stra. 1265.

⁴ Warwick v. Scott, 4 Camp. 62.

⁵ Lilly v. Ewer, Doug. 72.

⁶ Jeffrey v. Legendra, Carth. 216; 3 Levinz, 320.

⁷ Hibbert v. Pigou, 2 Park, 598.

⁸ D'Eguino v. Bewicke, 2 H. Bl. 551; see also Smith v. Readshaw, and De Garay v. Claggatt, 2 Park, 505; Manning v. Gist, Marsh. Ins. b. 1. ch. 8. s. 4., and Audley v. Duff, 2 B. & P. 111.

as under the protection of the convoy at all: he cannot answer signals; is ignorant of the place of rendezvous in a storm, and in short is not in a condition to understand or obey the orders of the commander.¹ It is enough however, that having done all in his power to obtain the instructions, he has been prevented by circumstances not imputable to him as a fault.²

3. The master must proceed either by the route indicated in the charter-party, or, if no intermediate ports be specified, by the direct and usual course, to the port of destination. If there be any unnecessary deviation from this route, and the goods be afterwards lost or damaged, the owner will be liable, whatever were the immediate occasion of the injury. It avails him nothing to say that the loss might equally have happened though the vessel had pursued the due and regular track; the obvious reply is, "we know that it has in fact happened in consequence of your wrongful act, for if you had not deviated, the vessel would not have been exposed to that particular accident at that time and place, and we do *not* know that any such accident would have befallen her, had not that deviation been made." Indeed it is a general rule of law that damages cannot be apportioned upon speculations as to possibilities.³

¹ Webb v. Thompson, 1 B. & P. 5; Anderson v. Pitcher, 2 B. & P. 164.

² 2 Stra. 444; Ridsdale v. Shedden, 4 Campb. 107; Magelhoens v. Busher, 4 Campb. 54. The cases upon the statutes (now expired) have been referred to in a former number, vol. xiv. pp. 120, 121.

³ Davies v. Garrett, 6 Bing. 723; Lloyd & Welsby's Merc. Cases, 276; Parker v. James, 4 Campb. 112.

In the first of these cases, a vessel having on board a cargo of lime, encountered a violent gale and shipped a sea, which forced its way into the hold, wet the lime, and caused it to ignite. The vessel was burnt down to the water's edge, and the whole cargo destroyed. It appeared that there had been a previous deviation, whereupon the owner of the lime brought an action on the case, alleging it to be "the duty of the owner of the ship to cause the said lime to be carried and conveyed on the said voyage according to the direct, usual, and customary way, course and passage, without making any unnecessary deviation from or delay in making the same," and obtained a verdict for the value. The other case was a loss from capture. The only question in dispute was the amount of damages, the freighter claiming, besides the prime cost of the goods and the shipping charges, the premiums also which he had paid for insurance, all benefit of which had been lost by the deviation. Lord Ellenborough, however, held that this additional sum could not be recovered, but the propriety of this decision may be doubted. It is true that if the goods had arrived safe, the premiums would equally have been lost, but if they had perished by a peril of the sea, for which the underwriters would have been liable, the measure of damages would have been the prime cost, together with the

Occasions, however, may arise which will not only justify but require a departure from the direct course, or a temporary stoppage at an intermediate port, such as stress of weather, intelligence of enemies or pirates, the necessity of refitting, of taking in supplies, of recruiting or filling up a crew reduced by sickness or mortality, a mutiny, and the like. But the necessity by which a deviation may be justified, must not only be immediate and pressing, it must itself also be the result of unavoidable circumstances. Thus, suppose a vessel were compelled to put into a port lying out of her course for a supply of water, it might be urged as a dilemma, either that there *was* sufficient water, in which case the deviation was unnecessary, or that there *was not*, in which case the vessel must have been unseaworthy when she sailed; and it would be incumbent therefore on the owner to show, first, that prudence required that the supply should be obtained; and secondly, that the deficiency had arisen from causes subsequent to the departure, and which could not have been foreseen or guarded against.¹ It need scarcely be said, that the deviation or stay at an intermediate port, even where justified by necessity, must not be prolonged one hour beyond the exigency of the occasion.

4. If the vessel should unfortunately be attacked by enemies or pirates, the master is bound to act the part of a brave man, and failing all means of escape, to make such resistance as, without a rash disregard of the lives of those on board, the comparative force of his ship and crew will admit. The master may also on emergency cast overboard² a portion of the cargo to save the vessel from wreck. Such emergencies occur when a sudden squall has laid her on her beam-ends, or a leak is gaining, and she is with difficulty kept afloat. The necessity, however, for such a sacrifice must be urgent and imperious, and

shipping charges and premiums of insurance. Now the benefit of the insurance was lost by the deviation, that is to say, by the wrongful act of the defendant. Ought he not then to have been placed in the position of the underwriters, and to have paid the loss according to the same rate? Lord Ellenborough said that there was no proof that the goods had been enhanced in value: but, with submission, they had been enhanced in value, at all events, by the sums expended in transporting them so far, which included the premiums paid for insurance.

¹ See the cases of *Granger v. Dent*, Ld. & Welsby, 270; *Forshaw v. Chabert*, 3 B. & B. 158, and *Weir v. Aberdeen*, 2 B. & A. 320.

² This casting overboard is known in law-merchant phrase by the name of *jettison*.

the master must account to the freighter for the value of the goods so lost, subject to such deduction by way of average, as the latter will be bound to contribute.

On this subject more will be said hereafter.

5. But a more difficult and responsible duty devolves on the master when by the perils of the sea his vessel has sustained injuries which may disable her from proceeding at all, or, at best, render a long detention unavoidable. In such an emergency what is the course to be pursued? He has undertaken for himself and for the owner that, saving inevitable risks, the goods shall be carried on board that particular vessel to their place of destination, and this undertaking must be performed as nearly as circumstances will permit. If therefore a reasonable prospect exist that the vessel may at some assignable time be able to resume and complete the service, and if the cargo be of a kind not likely to sustain material injury from the delay, it will be his duty, as regards both the owner in whose interest he acts, and the freighter, whose mandatary he is, to use every exertion for continuing the adventure.¹ But if the cargo be perishable, and a protracted detention unavoidable or even probable, he will be *justified*, if opportunity offer, in transferring it to another vessel, by which it may be carried more speedily to its destination.

In the absence of other means for procuring needful repairs, the master, as has been already stated,² may, subsidiarily to the hypothecation of the ship and freight, pledge also the whole, and even, if necessary, sell a *part* of the cargo, accounting to the freighter for the proceeds.³ In no case, how-

¹ Van Omeron v. Dowick, 2 Campb. 42.

² Ante, vol. xiv. p. 106. The student is once more referred to the case of the *Gratitudine*, 3 Rob. 240, for the best exposition of the principles by which the conduct of the master is to be governed in these cases of emergency.

³ As the benefit in this case is immediately to the ship-owner, whose duty it is to make every possible effort to perform his undertaking, the merchant, it seems, has a claim for the *real value* of the goods sold, and not merely for the actual sum produced by the sale. It is clear, however, that he may, if he please, adopt the sale, and set off the proceeds against the claim for freight upon the residue; *Campbell v. Thompson*, 1 Stark. N. P. C. 490. So far is plain: but when after such sale the vessel and cargo have been lost in the further prosecution of the voyage, it has been made a matter of much controversy, whether the merchant has in that case any claim for the proceeds of this partial sale. See *Abb. on Shipping*, p. 245. Most of the foreign jurists (and among them Valin and Pothier) are of opinion that he has such a claim. Emerigon and Abbott hold to the contrary opinion. It seems to the

ever, let it be remembered, can he either directly, or indirectly,¹ sell the *whole* cargo for enabling the vessel to proceed; for to what purpose, as regards the freighter, should she proceed at all, when, by the supposition, the stipulated service can no longer be performed.

But suppose not a temporary disability merely, but an irremediable incapacity to proceed—that the vessel, in short, is a wreck—how is the cargo, or such portion of it as may be saved, in that case to be disposed of? Obviously, where the means exist, it is the master's first duty to forward it to its destination with all practicable despatch. Failing this, it should, if possible, be sent back, or safely deposited² until the instructions of the freighter can be obtained.³ If this also be impracticable, or the quality and condition of the cargo be such as not to admit of storing or delay, necessity then breaks down the limits by which the powers and duties of the master are ordinarily circumscribed; he must place himself in the position of the parties directly interested; he must consider what in such an emergency a prudent owner would himself be likely to do were he present to direct; and having thus exercised an honest and careful judgment, he may safely abide the consequences of his acts.⁴ It is no unreasonable precaution in such cases to take counsel with any who may be competent to advise, and even to obtain the sanction of the civil authorities for the acts which in the last resort he may be driven to adopt; but it must be understood that the master cannot shelter himself from responsibility under the authority of any foreign tribunal, the jurisdiction of such tribunals in cases of this kind, as we have

writer, that the proceeds being at the time of the sale undoubtedly held in trust for the merchant, subject to his right of repudiating the act altogether, he has as it were a vested interest in them from that time, which cannot be defeated by subsequent circumstances. The Code de Com. Art. 298, decides that the master must account for the proceeds, deducting the freight, and this the writer ventures to think is the correct rule.

¹ In *Johnson v. Greaves*, 2 Taunt. 344, it appeared that the cargo had been hypothecated by an arrangement which gave the freighter no opportunity of redeeming them; but it was decided, that notwithstanding this clause, the freighter was entitled to have his goods on satisfying the charge.

² See 10 East, 526.

³ 2 Stark. N. P. C. 1.

⁴ In practice the goods are, in extreme cases of this kind, sold by the master for the benefit of all concerned, that is to say, ordinarily, of the underwriters.

already stated, not being recognized by the English courts. If, therefore, the sale or other deposit of the cargo be not justified by the exigency of the case, it will derive no legal validity, either as regards immunity for the master, or protection for the purchaser, from a judicial decree limiting or empowering the act.¹

6. It may be proper, though it seems almost unnecessary, to add, that if in the course of the voyage the adventure be arrested by the breaking out of hostilities or an interdiction of communication with the port of destination, it is the duty of the master to carry back the goods, or wait in some intermediate port for instructions from home, and that he has no right upon his own responsibility, though acting conscientiously and for the best, to vary the consignment or dispose of the cargo elsewhere.²

7. Throughout the voyage the eye of the master must be over the cargo. No precaution must be neglected which may be requisite for preserving it in good condition.³ Thus fruit must be ventilated, the leakage of casks, if possible, prevented, and incipient mischief, generally, checked. In short, whatever foresight, vigilance or care a prudent man would employ for the safe keeping of his own goods, such and no less must the master bestow in superintending the cargo committed to his charge: it is the obligation legally appertaining to his character of mandatary or bailee.⁴ On the same principle the owner

¹ Ante, vol. xii. p. 105, and the cases there cited. See also *Freeman v. E. I. Comp.* 5 B. & A. 617; *Wilson v. Dickson*, 2 B. & A. 2; *Cannan v. Meaburn*, 1 Bingham 243; *Morris v. Robinson*, 3 B. & C. 196.

² The Dutch have an excellent maxim: "Follow instructions and do wrong." It is at all events the safe course.

³ See 12 East, 381.

⁴ See ante, vol. vi. p. 429 et seq. See also Sir W. Jones on the Law of Bailments; *Coggs v. Barnard*, 2 Ld. Raym. 909; and *Dale v. Hall*, 1 Wils. 281. In that case the vessel had leaked through a hole gnawed by a rat, and the owner was held liable on the ground of negligence. The writer was concerned in a case in which the goods had been damaged by wet. The vessel, it appeared, was perfectly tight, and the only way by which the water could have penetrated was by a hole which had been made by a rat in one corner of the combings of the main hatch. It was proved on the part of the owner that the vessel on starting had two cats on board, but that one had escaped at Rio Janeiro, and the other had been accidentally suffocated in the ship's oven. The jury returned a verdict for the freighter, probably on the ground that if very diligent care had been bestowed the hole might have been detected, and stopped, before extensive mischief had been done. The

or master is responsible for losses occasioned by the pilfering or embezzlement of the crew.

Thirdly, as to the completion of the voyage. On arrival at their destination, the master having first safely moored the ship, must proceed to report her, and exhibit his manifest and other necessary papers. He must punctually observe all the regulations of the port, and pay the necessary charges of lights, pilotage, buoys, pierage, and the like. Lastly, he must take the requisite steps for discharging cargo and delivering the goods to the respective consignees; and on this head several matters are to be noticed.

1. In the unloading of the goods there must be a continuance of the same care which was exercised in the stowing and conveyance. As in the loading, so in the discharge of cargo the limit of the owner's liability is determined by the usage of the port. In general, when the discharge is by boats, the liability continues until the goods are deposited on the wharf; when by lighters, only until these are fully loaded.¹ Ordinarily the cargo is landed on a public wharf, along the quay, or in dock; and in all cases the ship-owner's responsibility ceases when the custody of the wharfinger begins.² The goods so landed become subject to a charge for wharfage, but the consignee may, if he desire to avoid this charge, require them to be delivered to him over the vessel's side.³

2. The goods are to be delivered according to the number, weight, or measure indicated in the bill of lading.⁴ In ascertaining the number no difficulty can exist: in other cases the goods are weighed at the king's beam or public scale, or are measured by official meters, where such an establishment

necessity of having cats on board is mentioned in all the foreign codes, ancient and modern.

¹ *Catley v. Wintringham*, Peake, N. P. C. 150. It was much contested whether the liability continued after the loading was on board the lighter, and until it was finally despatched, but it was at last decided in the negative. *Robinson v. Turpin*, Ab. on Sh. 250.

² It seems that it is usual in the port of London, when vessels are ordered into quarantine, for the consignee to send down his own servants to pack and take care of the goods; and it was held, therefore, that a consignee who had omitted to do so had no claim upon the master for damage occasioned by the goods being sent loose on shore. *Dunnage v. Jolliffe*, Ab. on Sh. 250.

³ *Syeds v. Hay*, 4 T. R. 260.

⁴ See ante, p. 115, as to the extent to which the description binds the master.

exists. Not unfrequently serious discrepancies are found to exist between the results so obtained and the quantities specified in the bill of lading, and it is not always easy to determine whether a deficiency is attributable to natural and intrinsic causes, such as evaporation, leakage, shaking, compression or the like, or to causes for which the owner would be responsible.¹ It is evident, however, that considerable latitude of allowance should be made, as well on account of the variations in the weights and measures of different ports, as of the changes both in bulk and gravity to which in the course of a long voyage many commodities are necessarily subject.¹

3. In the delivery reasonable despatch must be used, but when by charter-party a certain number of lay-days have been specified, the master is bound to wait, if required, throughout the period so prescribed.

4. By the bill of lading the goods are made deliverable either to A. B. or his assigns, or, more frequently, to the shipper's own order. In the former case, A. B. or his indorsee—in the latter, the holder of a part indorsed by the shipper is the person *prima facie* entitled to the delivery. But from the exposition which has been given in a former chapter,² of the doctrine of stoppage in transitu, it appears that a conflict of rights may occasionally exist between the consignor and consignee—that two parts of the bill of lading may be severally presented, each *prima facie* importing a title in the holder—and that the master must, at his own risk and that of his owner, decide to which of the rival claimants the preference is due. It is unnecessary to restate here the legal criterion for ascertaining the right, but it may be useful to intimate by way of practical caution, that the master ought strictly to observe the obligations which he has contracted by the bill of lading, without reference

¹ In practice, it is believed, a regular scale of allowance is established for some kinds of goods. In the corn trade certainly an average is taken, because it is known that corn settles into a much smaller bulk by the shaking of the voyage. In a case before the Scotch Courts, (*Stein v. Stenhouse*, 2d Feb. 1811,) it appeared from the list of the shore dues of Leith that the measurement at the end of the voyage was less in one out of 30, and more in one out of 100. The instances of excess might arise from moisture and consequent fermentation. In the case alluded to there was a deficiency of 4½ bolls upon 452, and the Court were of opinion that from such a diminution no presumption of embezzlement arose. 1 Bell's Comm. 557, 4to.

² Vol. v. p. 149.

to supposed rights acquired by the charter-party or other collateral contracts; that where (as is now commonly the case) the bill of lading makes the goods deliverable to the shipper's own order, the holder of a part *indorsed* by the shipper is to be preferred to the holder of a part *unindorsed*;¹ and that it will be prudent in all cases of controversy to procure, if possible, an indemnity from the party to whom the delivery shall be made.

Subject only to this right of stoppage in transitu, the merchant cannot, after bills of lading have been signed, vary the consignment either as regards the person or the place of destination. Of this the following affords a striking instance: By a charter-party for time the ship was to be at the disposal and direction of the freighter, and the master was to receive a cargo at London and proceed therewith to any port or ports in Spain or Portugal, or either, as he should be ordered by the freighter, and there deliver the cargo *agreeably to the bills of lading that should have been signed for the same*. In fact the ship was loaded for *Lisbon*, and the master signed bills of lading for delivery there, and an action having been afterwards brought by the master for the freight, it was resisted partly on the ground that he had not followed the directions of the freighter, by whom he had been subsequently ordered to take the cargo to *Gibraltar*. The Court, however, held that the defence was not available, on the ground that the freighter had no right to countermand his first order, and substitute a voyage to Gibraltar without first recalling the bills of lading

¹ *Brandt v. Bowlby*, 2 B. & Ad. 932—a case which on this subject may be consulted with advantage. The vessel was chartered by one Berkeley for corn purchased in and to be shipped from Russia. The bills of lading were made deliverable to the shipper's own order; an *unindorsed* part was transmitted to Berkeley, and an *indorsed* part to an agent of the shipper in London, who was to hand it over to Berkeley, on his giving security by bills for the price. Berkeley refused to give the required security, whereupon the agent of the shipper claimed the goods on their arrival, but the master delivered to Berkeley, on his assurance that he was entitled as purchaser, and that the goods were shipped on his account and to his order. An action was brought by the shipper against the owners of the vessel, founded on the bill of lading, for not delivering pursuant thereto, and it was admitted on the trial and argument, that even if Berkeley had established his right, there must have been a verdict against the defendants, with *nominal damages* for the breach of their contract.

or at least tendering sufficient indemnity to the master against the consequences of his liability thereon.¹

5. Lastly, in the absence of stipulations by charter-party inconsistent with the exercise of such a right,² the owner or master has a lien upon the cargo for the freight and charges specified in the bill of lading, that is to say, for the freight, primage and petty average. Nor is the lien lost by depositing the goods upon a wharf or in a public warehouse.³ In truth the master cannot insist on retaining the goods on board, because the consignee has a right to satisfy himself by inspection of the condition of the goods, and to verify the quantities by comparison. In the mean time the custody of the wharfinger or dock-company (as the case may be) is deemed to be the custody of the master, and indeed in some of the Dock acts⁴ there is a special clause expressly reserving the lien for the freight and charges.

If there be more than one consignment to the same person, any portion of the goods consigned may be retained for the freight of any other part or of the whole.⁵ Goods also of the charterer may, as has been already intimated, be held by way of lien for the hire of the vessel generally;⁶ but there is no lien on goods actually brought for *dead freight*, that is to say, for any sum claimed as due upon a charter-party by reason of the non-performance of a covenant to furnish cargo.⁷

The general obligations of the owner and master which have been thus enumerated are, for the most part, independent of any positive stipulations which may be introduced into a charter-party. Where a covenant exists the law is superseded, and the rights and duties of each contracting party are to be sought in the terms of their engagement. Thus the owner may covenant that the vessel shall follow a specific route; shall call at intermediate ports not in the direct line of

¹ Davidson v. Gwynne, 12 East, 381. See also the *Constantia*, 6 Rob. Adm. Rep. 321.

² See *Faith v. E. I. Comp.*, 4 B. & A. 630. The lien is not lost unless it appear clearly that the delivery was to precede the payment.

³ *Wilson v. Kymer*, 1 M. & S. 157.

⁴ As in the London Dock Act, 45 Geo. III. c. 58, s. 15.

⁵ *Soldergreen v. Flight*, 6 East, 622; *Ab. on Sh.* 247.

⁶ *Horncastle v. Farran*, 3 B. & A. 497.

⁷ *Ante*, p. 101.

the principal voyage; shall arrive at her out-port on or before a given day, absolutely, or subject to specified contingencies; and in these and the like cases he will be bound by the law which he has imposed upon himself, however rigorous and severe. On the other hand, his responsibility may be in part relieved by the presence on board of an agent of the merchant in the quality of supercargo, and by special clauses of exemption introduced for his protection. Still, in its interpretation of these express covenants, the law asserts a controlling authority by confining them within equitable limits, and, as on the one hand it permits no stipulation to be pleaded as an excuse for culpable neglect, so, on the other hand, it will not suffer even an absolute undertaking to be pressed with an unreasonable strictness. A single instance will sufficiently illustrate this latter position.

A charter-party, whereby a vessel was let to the East India Company, contained, among other special clauses then usually inserted, the following:

“ And if any of the homeward-bound cargo shall be lost or undelivered into the said company's warehouses at the said ship's arrival in England, (except that no such payment shall be made if there happens an utter and inevitable loss of ship and cargo, nor shall any other payment be made for such goods as shall necessarily perish, or be cast into the sea for the preservation of the ship and cargo, than by an average to be borne by ship, freight, demurrage and cargo,) the part-owners and master shall pay and allow to the Company the prime cost of such goods and 30*l.* for every 100*l.* on such prime cost.

“ But if any of the homeward-bound cargo when delivered into the Company's warehouses in England shall be found to be prejudiced, wet, or damnified by any occasion or accident whatever, it shall be lawful for the Company to refuse such goods, and in such case the part-owners and master shall take them, and allow to the Company the sum which they are invoiced at, with charges, customs and duties; and in such case the Company shall pay no charges or freight for the said goods so prejudiced, wet, or damnified, unless in case of damaged pepper, *which the part-owners and master are to allow the Company for at the current price of sound pepper in Lon-*

don, and the Company are to pay the freight and charges on such pepper, as if it were not damnified."

By a further clause the obligation of the owners and master to make this payment was confined to the case of ship-damage.

The vessel thus chartered, on her return home from India encountered a storm off Margate whereby she was stranded and sunk under her water: a great part of her cargo was lost; the remainder, principally pepper, was greatly damaged, although by great exertions it was ultimately so far recovered as to be marketable. The ship was lightened, raised up, and finally brought into port with a small portion of the cargo still on board.

In the strict and literal construction therefore of the clauses above cited, the owners of the vessel would have been liable to the Company for the specified payments; but the jury first, and the court afterwards, decided otherwise, Lord Mansfield observing that it never could have been the intention of the owners to make themselves insurers against the perils of the sea, and that the obligations upon them arising out of the fair construction of the charter-party were, "that they should be answerable [in the mode there stated¹] for damage occasioned by their own fault, or that of their servants, as from defects in the ship, or improper stowage, such as mixing commodities together which hurt one another, &c."²

It may safely, therefore, be laid down, that in no case is the owner or master bound absolutely, and at all events, to deliver the goods "in the like good order and condition" as when received on board. The liability even of the *common carrier*—to whom, certainly, no great indulgence has been manifested by the law—was qualified by an exception of the act of God and of the king's enemies, and, with much more reason, should the private contractor be free from the consequences of inevitable mischance. In fact, however, every charter-party and

¹ It seems necessary to make this qualification of the terms of the judgment because, otherwise, the covenant would do no more than the law would have done without it, that is to say, would be useless. The correct reasoning seems to be that the clauses were intended to fix the *mode and measure of the liability* for casualties for which the owners would be ordinarily responsible.

² Ab. on Sh. 202, 3, 4. The judgment received the unanimous sanction of the judges in the House of Lords in another case arising out of the same facts. *Ibid.* note (u).

bill of lading contains an express reservation in these or equivalent words:—"The act of God,¹ the king's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of what nature and kind soever, excepted." To this enumeration is occasionally added, "the restraints and detentions of kings, princes, rulers and republics;" and in West India voyages, in which the cargo is usually discharged by boats, there is, moreover, a saving from the exception itself of "the risk of boats, so far as ships are liable thereto." The reservation was formerly expressed more concisely, thus—"the dangers of the seas excepted;" and it may be doubted whether the more circumstantial form now in use has materially varied the effect.²

1. The immediate act of God, as manifested in lightnings, earthquakes, hurricanes, and the like, and the assaults of a hostile force entailing capture or destruction, are visitations which need no explanation, and which, under any circumstances, must be admitted in excuse.

2. For fire originating on board the vessel itself, the owner and master might be liable in law on the ground of real or imputed negligence, but, as regards the owners, the responsibility has been removed by statute;³ and the only advantage, therefore, of inserting this word among the exceptions, is to remove a doubt whether the protection of the statute would extend to the *master*, as not being expressly named.

3. The phrase "accidents of the seas, rivers and navigation," or its equivalent, "perils of the sea," comprehends not only what is primarily imported by it, as storms, wreck, strand-

¹ As to the interpretation of these words, see ante, vol. vi. p. 447, and the case of *Smith v. Shepperd*, Abb. on Sh. 252.

² This alteration, according to the learned author of the *Law of Shipping*, was made in consequence of the decision in *Smith v. Shepperd*, in which Mr. Justice Heath, with the subsequent confirmation of the Court, held the owner of a flat, navigating the Ouse and Humber from Selby to Hull, liable for a casualty certainly imputable to no negligence on his part, and within the ordinary acceptance of a peril of the sea, on the ground that, being a common carrier, he was an *insurer*. Abb. on Sh. 252.

³ 26 Geo. 3, c. 86, s. 2, by which it is enacted, "that no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good, to any one or more person or persons, any loss or damage which may happen to any goods or merchandize whatsoever, which, from and after the 1st day of September, 1786, shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any fire happening to or on board the said ship or vessel."

ing, striking upon a rock, springing a leak, and, in short, the thousand forms in which danger hovers round the adventurous navigator, but also the more remote consequences of such disasters, as, for example, the plundering by the inhabitants of a vessel driven on shore.¹ It has been held, also, to apply to a capture by pirates, proof having been tendered and admitted that it was so understood among merchants;² a result which agrees with the rule of the civil law, and with all the foreign codes.³

Nor is the definition confined to casualties from natural causes only. If the *immediate* cause of injury be the force of winds and waves, it matters not, so long as no blame is imputable to the master or crew, that the mischief was occasioned by human agency. For example, if a vessel compulsorily taken in tow by a man of war,⁴ or forced to crowd sail to keep up with convoy, were, from the necessary efforts to increase her speed, to ship a sea, by which her cargo was wetted and damaged, this would be a casualty within the meaning of the exception. So damage arising from a leak, occasioned by the wilful or negligent running down of the ship by another vessel, has been held to be a peril of the sea, Mansfield, C.J. saying, "I do not know how to make this out not to be a

¹ Bondrett v. Hentigg, cor. Gibbs, C.J.; Holt, N. P. C. 149.

² Pickering v. Barclay, 2 Roll. Ab. 248; Style, 132; see also Barton v. Wolliford, Comb. 56. In strictness, the construction of words in an instrument of contract may be said to belong to the Court; but cases are cited in Ab. on Sh. 254, 255, which, in the words of the author, "furnish very strong authority to show that even if the decision of the question does properly belong to the judge, yet his decision will be guided by usage and the course of practice among merchants, which are matters of evidence and fact." And, in truth, is the real province of the judge more than this—to direct the jury that whatever, in mercantile practice, is the received acceptance of the words, the contracting parties must be presumed to have intended, leaving it to them, either upon their own knowledge or instructed by evidence, to determine what that acceptance is? In this view the evidence is clearly admissible. "In all mercantile contracts," observes Lord Hardwicke, (2 Ves. sen. 331,) "the articles are commonly extremely short, [his lordship would have little fault to find in this matter had he lived in our times,] and where a doubt arises about them, the usage and understanding of merchants is read thereto."

³ It has been before said, that for losses by robbery, within the body of an English county, the owner and master are responsible, ante, p. 114; and in Morse v. Slue, 1 Vent. 190, wherein it was so decided, Chief-Justice Hale distinguished the case from a robbery by pirates at sea, for which it was admitted, that, "by the Civil Law Admiral, the owners were not responsible."

⁴ Hagedorn v. Whitmore, 1 Stark. N. P. C. 157.

peril of the sea. What drove the one vessel against the other? The sea. What was the reason that the crew of the other ship did not prevent her from running against the *Helena*? Their gross and culpable negligence: but still the sea did the mischief."¹

Still, as has been already intimated more than once, the benefit of the reservation can be claimed only where there has been no negligence or fault of any kind on the part of those by whom the vessel is navigated. Thus, if the vessel damaged by collision could, by any effort, have avoided the shock, the responsibility remains. So, in the instances preceding, if the taking in tow had been occasioned by improper or suspicious conduct on the part of the master, or the falling behind the convoy had arisen from remissness or want of skill in manœuvring the ship, the reservation would not have been availing.² On the same principle losses, however occasioned, after a wilful or unauthorized deviation, are not protected by the exception. And there can be no doubt that in all cases, if the accident might have been avoided by the exercise of that skill and care which are essential qualifications of every master, it will not be accounted a peril of the sea. Thus, if the loss be occasioned by striking, in fair weather, on a sunken reef, known to navigators and laid down in the charts, this is negligence, and must be answered for accordingly. But if the ship were driven by a gale upon the reef, or there were no reason to suspect its existence in that spot, the master would be exonerated, and the exception would attach.³

¹ *Smith v. Scott*, 4 Taunt. 126. This case, as well as the others cited to this point, arose upon a policy of insurance, and is to be received, therefore, merely as an illustration of the principle. See also *Thompson v. Whitmore*, 3 Taunt. 227; *Fletcher v. Inglis*, 2 B. & A. 315; *Bever v. Tomlinson*, Ab. on Sh. 256; *Buller v. Fisher*, Ab. on Sh. 255; *Cullen v. Butler*, 1 Stark. N. P. C. 138; 5 M. & S. 461.

² *Hagedorn v. Whitmore* was a case of this kind. The vessel was taken in tow by a British man-of-war, and the injury arose from the excess of her speed through the water; as against the underwriters on a policy, this was held to be a peril of the sea. It appeared, however, that the ship was taken in tow by reason of the master having at first produced *simulated* papers, under a mistaken idea that the man-of-war was a Frenchman; and whether this conduct was excusable, might be questioned in a case upon a contract of affreightment.

³ Ante, p. 355; *Emerigon*, tom. i. p. 373. See also the *Proprietors of the Trent and Mersey Navigation v. Wood*, Ab. on Sh. 245.

4. The "restraints and detentions of princes, rulers," &c. are understood as signifying only "actual and operative restraints, not such as are expected and contingent merely, however reasonable and well founded the apprehension may be, or however fair and honest the intention of the master."¹

5. The saving of "the risk of boats" is not construed as fixing upon the owner an absolute liability for all injuries to goods in their transit by boats from the vessel to the shore, but simply as qualifying the generality of the exception, which might otherwise, it was apprehended, be taken as affording immunity to the owner in respect of accidents to which small craft is of course more liable, but which, by increased care, might nevertheless be avoided. The precaution, however, seems to be superfluous: for where greater care is required, the law does not fail to exact it.

We have hitherto, for convenience sake, spoken of the liability, in respect of the obligations as to the carriage and delivery, as attaching upon the owner or master indifferently, but it will be necessary, before we proceed further, to distinguish, in this respect, somewhat more particularly.

Each, of course, is liable upon his own express contract—upon a charter-party, the owner or the master, or both, according as either or both are parties to it—and the master upon the bill of lading always. Generally, also, the obligations contracted by the owner are equally binding upon the master, as his agent or servant, in all matters immediately arising out of the contract which it is the part of the master to perform; and, conversely, the owner is liable to all the incidents of such engagements as the master has a general authority to contract on his account,² and is responsible, as the principal by whom he is appointed and set in motion, for his misconduct or breach of duty in the course of such engagements. But where the claim of the freighter for damages arises not upon the bill of lading, or the general obligations of the owner or master as carrier, but upon a special contract by charter-party, it is material to advert to a technical distinction of the English law between a contract under seal and one reduced into writing merely without the formality of sealing. The distinction is,

¹ *Atkinson v. Ritchie*, 10 East, 534, per Lord Ellenborough.

² See ante, vol. xiii. p. 385.

that a deed, or contract under seal, furnishes no action for or against any but those by whom it is executed either in person or by the medium of a power of procuration also under seal;¹ and that in all matters as to which it expressly covenants, it supersedes, as to the parties executing, all engagements implied by law or expressed in an instrument not under seal. It follows, therefore, 1st, that upon a charter-party by deed, executed by the master alone, he only, and not the owner, can be sued, and conversely as to a charter-party executed by the owner; and, 2dly, that where such a charter-party exists, an action for the breach of any of the engagements expressly comprehended within it, must be founded upon the instrument itself, and not upon the general obligation of the owner or master; or, to speak technically, must be in covenant, not in case or *assumpsit*.²

Subject to this qualification it may be laid down generally, that for non-delivery, damage, &c. the shipper has an action either against the master as the party immediately in default, or against the owner, whether directly upon his personal contract by charter-party, or by implication upon the contract of the master; and in this respect the law of England is in exact conformity with the civil law and all other systems of maritime jurisprudence.³

By the rule of the common law in this, as in all other cases, the liability to amends is co-extensive with the injury sustained, and the criterion adopted in case of the loss or damage of goods is the value which they would have fetched at the market of their destination had the delivery been duly made. But inasmuch as merchandize of great cost is oftentimes necessarily confided to the charge of masters of merchant-vessels, the le-

¹ See *Harrison v. Jackson*, 7 T. R. 209, and *Horsley v. Rush*, there cited; *Elliott v. Davies*, 2 B. & P. 338; *Berkeley v. Hardy*, 5 B. & C. 355; *Bac. Abr. Authority, A.*

² *Hunter v. Prinsep*, 10 East, 378. It was an action against the owners in *assumpsit*, in which the two first counts of the declaration alleged a non-delivery of goods according to the undertaking of the bill of lading. It appeared, however, that the owners had covenanted by charter-party under seal, "to make a right and true delivery," and the Court therefore held that these counts could not be sustained, because "the plaintiffs, having contracted with the defendants by charter-party under seal, could not charge the defendants in respect to the same subject-matter by virtue of a contract not under seal, and signed by their master only, and not by themselves."

³ See *Pothier; Traité de la Ch. Partie*, part 1, art. 3.

gislature, apprehending that the severity of the rule by which the owners were held answerable to the full extent for losses occasioned, without fault on their part, by the default or misconduct of the master or crew, might operate as a discouragement to commerce,¹ has, by various enactments, established a distinction in this respect between the owners and the master, assigning a limit to the responsibility of the former, but leaving that of the latter untouched.

Of the justice and expediency of some limitation of this kind no reasonable doubt can be entertained; the principle indeed had long been recognized in the celebrated French Ordinance, in which it is expressly declared, "that the owners of ships shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing the ship and freight;" and in imitation of this precedent, the Ordinance of Rotterdam, issued in 1721, contains a like provision, "that the owners shall not be answerable for any act of the master done without their order, any further than their part of the ship amounts to." The first English statute by which a limitation was introduced was passed in the year 1733, and seems to have been immediately occasioned by a dictum of Lord Hardwicke,² that the owner of a vessel employed on general freight would be answerable for specie delivered to the master to be carried and by him embezzled. Accordingly it was against the occurrence of such a case that the remedy was principally intended, and it was enacted³ that no owner of a ship should be subject to or liable to answer for or make good to any person any loss or damage by reason of any embezzlement, secreting or making away with by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandize which should be shipped on board any vessel, or for any act, matter or thing, damage or forfeiture done, occasioned or incurred by the master or mariners without the privity of the owner, further than the value of the ship with her appurtenances and the full amount of the freight due or to grow due for the voyage. And after providing in the second and third sections for con-

¹ See the preamble to the stat. 7 Geo. II. c. 16.

² In *Boucher v. Lawson*, Cas. Temp. Hardwicke, 35.

³ 7 Geo. II. c. 16.

tribution among the respective freighters, when more than one should have sustained loss, it was in the fourth declared that the remedy against the master or mariners should not be lessened or affected by that enactment.

Fifty years after the passing of this statute an alarm was again created among the proprietors of ships by a decision of the Court of King's Bench,¹ that the owner of a vessel plundered by a gang of robbers in the river Thames was liable to make good the loss of the shippers, and as it was then discovered that the benefit of the limitation was not applicable to such a case, a further statute was passed² by which the same limitation of responsibility was fixed as well in the cases before mentioned, as in that of robbery also, "although the master or mariners should not be in anywise concerned in, or privy to such robbery, embezzlement, secreting or making away with." A clause,³ moreover, was added, that "*neither the master nor owner* of any ship or vessel should be liable to answer for or make good any gold or silver, diamonds, watches, jewels, or precious stones lost or embezzled during the course of the voyage, unless the shipper thereof should insert in his bill of lading or declare in writing to the master or owner the true nature, quality and value of such articles."⁴

Important, however, as were these enactments, the experience of twenty-five years more, during which the commerce of Great Britain had grown up with a rapidity and vigour almost miraculous, disclosed imperfections, which it was thought expedient to remedy by a new and more comprehensive statute. Accordingly, in 1812, an act was passed⁵ by which the limitation was still further extended, and minute provision made as to the mode of proceeding by parties interested; and as this act may be considered as superseding or incorporating the provisions of the former statutes with respect to all vessels, except such "as are used solely in rivers or inland navigation, or are not duly registered according to law," which are expressly excluded,⁶ it will be proper to give a concise abstract of its principal contents.

¹ Sutton v. Mitchell, 1 T. R. 18. ² 26 Geo. III. c. 86. ³ Sect. 3.

⁴ Upon this clause it is to be observed, that it will not protect the master from the consequences of gross negligence, much less of positive fraud.

⁵ 53 Geo. 3, c. 159.

⁶ Sect. 5.

After a recital that "it is of the utmost consequence and importance to promote the increase of the number of ships and vessels belonging to the United Kingdom, registered according to law, and to prevent any discouragement to merchants from being interested therein," and a reference to the former statutes which it is considered expedient to amend, it is enacted, 1. That no owner or part-owner of a vessel shall be liable to answer for or make good any loss or damage arising from any act, neglect, matter or thing done, omitted or occasioned, without the fault or privity of such owner, to any goods on board the vessel, further than the value of the vessel,¹ and the freight due or to grow due for the voyage which may be in prosecution or contracted for, at the time of the happening of such loss or damage,² under which term, "freight," are to be included the value of the carriage of goods belonging to the owner, and the hire of the vessel under charter-party, commencing within six calendar months after the accident.³ 2. That where the loss shall arise by reason of several distinct accidents or acts in the course of a voyage, or after the end of one voyage and before the commencement of another, each loss shall be satisfied, according to the provisions of the act, as if no other loss had happened or arisen.⁴ 3. That nothing therein contained shall lessen or take away any responsibility to which any master or mariner is by law liable, though he be owner or part-owner of the vessel.⁵ 4. That each individual sufferer may bring his action against the owner, although others have suffered by the same act or accident, or on the same occasion.⁶ 5. That where several persons shall have sustained loss, and the value of the vessel shall be insufficient to make full compensation to all, the owners may exhibit a

¹ It has been held that whatever is on board a ship for the accomplishment of the objects of the voyage and adventure in which she is engaged, and belonging to the owners, constitutes part of the ship and her appurtenances; and that from the subsequent clauses it appears that this first section is to be read as if the words "with her appurtenances" were contained therein. *Gale v. Lawrie*, 5 B. & C. 156. And see 1 Hag. Adm. Rep. 109.

² Sect. 1.

³ Sect. 2.

⁴ Sect. 3. The writer does not profess to understand this action, which seems as if purposely made unintelligible.

⁵ Sect. 4.

⁶ Sect. 6.

bill in equity against all parties claiming or entitled to recompence for losses arising from one and the same act or accident, or on the same occasion, in order to the ascertaining of the value of the ship, appurtenances and freight, and for payment or distribution thereof rateably among such claimants;—that to this bill the plaintiff shall annex an affidavit, setting forth that he does not collude with any of the defendants or other persons, but that the bill is filed for the purposes only of justice, and to obtain the benefit of the provisions of the act; that the defendants are, so far as he believes, the only persons claiming recompence for loss sustained on the same occasion; that the value of the ship, appurtenances and freight does not exceed a sum to be specified in such affidavit; and that the claims of the defendants exceed in the aggregate that value;—that on filing the bill the plaintiff shall pay into Court the value so specified, no defendant being compellable to answer until this has been done, or security given instead thereof, if so ordered by the Court;—that for default in this respect the bill shall, at the expiration of one month, stand dismissed, with costs to be paid to the defendants;—and that if the bill be dismissed after payment of the money into Court, the money so paid in shall be apportioned and distributed by the Court among the several claimants.¹ 6. That if it shall appear to the Court that the true value has not been paid in, an order may be made for the payment of a further sum, or the giving of a further security.² 7. That the preliminary proceedings being regularly perfected, the Court shall take all such measures as shall seem just for ascertaining the value of the ship, appurtenances and freight, the amount of the losses or damages claimed by the defendants respectively, and whatever else may be necessary for doing justice in the suit, and for payment and distribution of the value among the several persons entitled.³ 8. That a bill filed by one part-owner shall be binding on the rest,⁴ and that any sum paid on account of such damage, or of any cost incurred in relation thereto, may be brought into account among the part-owners as money disbursed for the use of the vessel.⁵

Upon this statute it has been decided that several part-

¹ Sect. 7.

² Sect. 8.

³ Sect. 10.

⁴ Sect. 14.

⁵ Sect. 16. The other clauses contain principally regulations of practice merely.

owners, sued jointly for the loss of goods laden on board their vessel, were entitled in their collective character to the benefit of the limitation, although the loss was occasioned by the misconduct of one of the defendants, who was part-owner as well as master;¹ that the value of the ship is to be calculated with reference, not to the commencement of the voyage, but to the time of the accident;² and that in calculating the value of the freight, the whole sum payable in respect of that voyage is to be included, whether paid in advance or not, subject to such diminution by jettison or other losses as would have been made if the voyage had been completed.³

Of the exemption of the owners from responsibility for loss or damage arising from the incapacity of a licensed pilot having the management of the vessel, or from the absence of a pilot when required, unless it shall be proved that the absence was occasioned by the act or default of the master, we have already spoken in a former chapter;⁴ and here, therefore, we conclude our inquiry into the obligations and liabilities of the owner in respect of the carriage and shipment of goods, reserving for a subsequent discourse the obligations which relate to the payment of the freight and other charges, and are binding, therefore, reciprocally, upon the freighter.

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¹ *Wilson v. Dickson*, 2 B. & A. 2.

² *Ibid*; *Cameron v. Raeburn*, 1 Bingh. 471; *Dobree v. Schroder*, Sim. 291.

³ *Wilson v. Dickson*.

⁴ Vol. xiv. pp. 118, 119.

ART. VI. — ON THE SALE AND ASSIGNMENT OF OFFICES, AND THE RECOVERY OF MONIES ADVANCED IN CONSIDERATION OF SUCH SALE OR ASSIGNMENT, OR OTHER ILLEGAL PURPOSES, AND THE DELIVERY UP OF INSTRUMENTS EXECUTED FOR ILLEGAL PURPOSES TO BE CANCELLED, AND JURISDICTION THEREIN OF THE COURTS OF LAW AND EQUITY RESPECTIVELY.

It is proposed to consider in this place what particular offices may or may not be sold under the present state of the law of England, and not to whom or for what estate they may be granted or created. The sale of certain offices

is restrained both by common and statute law, and those offices are divisible into offices judicial and ministerial. The former have reference to the administration of public justice, and must be exercised by individuals of adequate ability and experience in the duties of such offices; the latter are those which demand only ordinary care and attention in the proper discharge of them. Ministerial offices are also either of a public or of a private nature. The earliest statute on the subject is that passed in the twelfth year of the reign of Richard II., by which it is accorded, "That the chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and of the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of peace, sheriffs, escheators, customers, comptrollers, or any other officer or minister of the king, shall be firmly sworn that they shall not ordain, name, or make any justice of the peace, sheriff, escheator, customer, comptroller, nor any other officer or minister of the king, for any gift or brokerage, favour or affection, nor that none which pursueth by him or by other, privily or openly, to be in any manner of office, shall be put in the same office, or in any other, but that they make all such officers and ministers of the best and most lawful men, and sufficient to their estimation and knowledge." Of this statute Lord Coke speaks as of a law worthy to be written in letters of gold, but more worthy to be put in due execution, "for certainly," continues he, "never shall justice be duly administered but when the officers and ministers of justice be of such quality, and come to their places in such manner, as by this law is required."¹ But the most comprehensive legislative enactment on the subject was the act of the 5 & 6 Edw. VI. c. 16, by which it was declared, "That if any person should at any time thereafter *bargain or sell* any office or offices, or deputation of any office or offices, or any part or parcel of them, or receive, have, or take any money, fee, reward, or any other profit, directly or indirectly, or take any promise, agreement, covenant, bond or other assurance to receive or have any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or for the deputation of any office or offices, or any part of any of them,

¹ Co. Lit. 234.

or to the intent that any person should have, exercise or enjoy any office or offices, or the deputation of any office or offices, or any part of any of them, which office or offices, or any part or parcel of them, should in anywise touch or concern the administration or execution of justice, or the receipt, controlment or payment of any of the king's highness's treasure, money, rent, revenue, account, aulnage, auditorship, or surveying of the king's majesty's honours, castles, manors, lands, tenements, woods or hereditaments, or any of the king's majesty's customs, or any other administration or necessary attendance to be had, done or executed in any of the king's majesty's custom-house or houses, or the keeping of any of the king's majesty's towns, castles or fortresses being used or occupied for a place of strength and defence, or which should concern or touch any clerkship to be occupied in any manner of court of record wherein justice is to be ministered, that then every person and persons so bargaining and selling such office or offices, or giving or paying any money, fee, reward or profit, or making any promise, agreement, bond or assurance for any of the said offices, should be adjudged a disabled person to have, occupy, possess or enjoy the said office or offices." The act then proceeds, in section 3, to declare, "that all such bargains, sales, promises, bonds, agreements, covenants and assurances should be void;" and by sections 4 and 7 it is provided, "that the act should not extend to any office of inheritance, or of parkership, or of the keeping of any park, house, manor, garden, close or forest, or to any of the chief justices of the king's courts, commonly called the King's Bench or Common Place, or to any of the justices of assize that then or thereafter might be, but that they and every of them might do in every behalf touching or concerning any office or offices to be given or granted by them or any of them, as they or any of them might have done before the making of the act." It seems that previously to the year 1809, the practice of bargaining for and selling places of public trust had become matter of notoriety, and accordingly the statute of 49 Geo. III. c. 126, was passed, by which the provisions of the statute of 5 & 6 Edw. VI. c. 16, were extended to Scotland and Ireland, and to all offices in the gift of the crown; and by sections 3 and 4 of the former act, it is created a misdemeanor for any

person to buy, or sell, or receive, or pay any money or rewards for any of the offices specified or described in either of the two last-mentioned acts, or for soliciting or obtaining such offices, or any recommendation or negotiation relating to such offices; and by the statute 49 Geo. III. c. 126, the sale of certain offices in the court of the king at the Palace at Westminster, of offices excepted in the statute of 5 & 6 Edw. VI., and offices saleable before the passing of that statute of commissions in the army under the regulated prices, and the reservation of payments arising from fees or profits of offices, are excepted; and the only other enactments applicable to this subject are those contained in the statutes 6 Geo. IV. c. 82 and 83, abolishing the sale of offices in the Court of King's Bench and Common Pleas in England: and although a bargain respecting an office, or sale of an office, may not be within the statute of 5 & 6 Edw. VI., it will still be void if it be proved to be a fraud on a third person, or against the general policy of the law; for instance, if a covenant be entered into that if the plaintiff will procure the defendant to be appointed to an office, he will pay the plaintiff a share of the profits and emoluments, and this be without the knowledge of the party who has the right of appointing to the office, it is such a fraud on him as will avoid the covenant, and it is quite immaterial whether the office be one lawfully saleable or not.¹ It has been determined that the act of 5 & 6 Edw. VI. c. 16, extends to officers of spiritual courts, as chancellor and commissary,² surrogate,³ archdeacon, register,⁴ the office of clerk of fines to a justice in Wales,⁵ the place of gaoler,⁶ the stewardship of a court leet,⁷ the office of undersheriff,⁸ previously to the passing of the statute 3 Geo. I. c. 15, but not to a bailiff of a hundred.⁹ But it has been held that the office of clerk to the deputy-registrar in the Prerogative Court of Canterbury is not an

¹ Waldo v. Martin, 4 B & C. 319; Blackford v. Preston, 8 T. R. 89.

² Dr. Tudor's case, Cro. Jac. 269; S. C. by the name of Rowbotham v. Tudor, Brownlow, 11.

³ Juxton v. Morris, 2 Ch. Ca. 42.

⁴ Woodward v. Fox, 3 Lev. 289; Laying v. Paine, Willes, 571.

⁵ Per Cur. Walter v. Walter, Goldsb. 180.

⁶ Stockwell v. North, Mod. 781; Northwald v. Walbrook, 2 Ves. 283.

⁷ Williamson v. Barnsley, Brownlow, 70.

⁸ Browning v. Halford, Fr. 19.

⁹ 4 Leon. 33.

office connected with the administration of justice within the meaning of the statute 5 & 6 Edw. VI. c. 16, so as to prevent its being aliened or charged, and that an alienation of, or charge on the profits of that office, is not contrary to the policy of the law restricting the alienation of the income of a public office,¹ nor does the office of private secretary fall within the meaning of the statute; and an assignment of the profits of all offices which the defendant might acquire is good as to all those that may be legally assigned;² but an agreement by which a deputy officer appointed by his principal is to receive all the fees and pay his principal a fixed and certain sum per annum absolutely, and not out of the fees received, is void under that statute.³ The office of clerk of the peace would appear also to be comprised in the statute 5 & 6 Edw. VI. c. 16, but a particular provision is made against the sale of that office by stat. W. & M. sess. 1, c. 21, with a proviso that the act should not extend to the clerk of the peace of the county of Lancaster, who holds his office for lives.⁴ In *Blatchford v. Preston*⁵ a contract for the sale of the command of an East India ship, contrary to the bye-laws of the Company, was held to be void; but it seems that if an office be sold, as a commission in the Marines, under any general regulation, right or wrong, or if the transaction respecting the sale between the parties is carried on under any authority, or with the consent of their superiors, the Court cannot set aside the sale,⁶ and so the law stood previously to the statute of 4 Geo. III. c. 126, authorizing the sale of commissions in his majesty's forces. In a recent case⁷ a question arose whether the office of sworn clerk, on the plea side of the Court of Exchequer, was saleable or assignable at common law, and whether it was such an office as was contemplated by the statute 5 & 6 Edw. VI., and connected with the administration of justice, and in the due performance of the duties whereof the Court, the suitors, and the public were all interested. The duties of a sworn clerk, and also it seems of a side clerk, in

¹ *Ashton v. Greenwell*, 3 Y. & J. 136.

² *Harrington v. Klopogge*, 6 Moore, 31, n.; 2 B. & B. 678, n.; 4 Dougl. 5.

³ *Godolphin v. Tudor*, (in error,) 1 Bro. P. C. 135.

⁴ *Hughes v. Statham*, 4 B. & C. 187; *Palmer v. Bate*, 2 Brod. & B. 673.

⁵ 8 T. R. 89.

⁶ *Parsons v. Thompson*, 1 H. B. 326. ⁷ *Clarke v. Richards*, 1 Y. & C. 351.

the Court of Exchequer, consisted principally in being entering clerks, through the agency of the deputy clerk of the Pleas, for the purpose of making out writs, entering up judgments, and transacting various matters which in other courts of law were transacted by officers having more appropriate and definite names. The sworn clerks and side clerks had also the privilege of acting as attornies exclusively in the Court of Exchequer, and the principal part of their emoluments arose, as it is now admitted, from that privilege; and a fee of 300 guineas was always paid by the side clerk to the sworn clerk, in whose division he was, on his appointment to that office; and a further annual fee of ten guineas was paid to the sworn clerk whilst the party continued to discharge the duties of side clerk. The present Lord Chief Baron, it is said, was inclined in the case last cited, to think that the office of sworn clerk in the Court of Exchequer was not such an office as could be legally made the subject of a partnership arrangement, but such an opinion does not appear in the case as reported; and an application to rehear the cause on the part of the plaintiff has been granted by his lordship, on the ground of the compensation awarded by the late acts¹ having been given by the commissioners after consulting the Bârons of the Exchequer on the point, not solely in respect of official fees, as supposed in the judgment of the Lord Chief Baron, but partly only in respect of official fees, and partly and principally of fees derived from the discharge of the duties of an attorney of the Court. The interlocutory order in this case is now the subject of appeal to the House of Lords.

Previously to the hearing in *Clarke v. Richards* the case of *Ellis v. Walmsley* had been argued at some length before the present Lord Chancellor, then Master of the Rolls, who, after several weeks' consideration, decided, that the plaintiff was entitled to share in the profits derived from the office of side clerk in the Court of Exchequer, by virtue of articles of partnership made between plaintiff Ellis, the defendant Walmsley, and Gorton, the three partners, (Gorton having become bankrupt,) wherein it was declared that the office of side clerk had been assigned to Gorton by Ralph

¹ 11 Geo. IV. and 1 Wil. IV. c. 58, s. 16; 1 Wil. IV. c. 70; 1 & 2 Wil. IV. c. 35; 2 & 3 Wil. IV. c. 110.

Ellis, the elder, the father of the plaintiff, to be held by Gorton for *partnership* purposes. The judgment of the late Master of the Rolls, now Lord Chancellor, was affirmed by the late Lords Commissioners Shadwell and Bosanquet, and in the argument before them the illegality of the assignment of the office of side clerk was strongly insisted upon, and many of the cases above mentioned were cited on that occasion to the Court. It is quite clear that the office of side clerk, and we should apprehend that of sworn clerk also, previously to the transfer of the duties thereof to other persons by the recent statutes, were ministerial only, and (as it would seem to follow from the cases) not within the meaning of the stat. 5 & 6 Edw. VI. c. 16, for in the case of *Sparrow v. Reynolds*, C. B. Pasch. 26 Car. II. it was determined, that a seat in the Six Clerks Office was nothing more than that of an under-clerk, and not within that statute; but one of the learned judges seemed to think that it was an office not saleable at common law. Should it, however, be solemnly determined that the office of sworn clerk in the Exchequer is not saleable or assignable, it will be far from certain, especially after the recent decision of the Lords Commissioners in *Ellis v. Walmsley*, that there is not such a distinction between the offices of sworn clerk and side clerk in the Court of Exchequer, as will leave the question of the legality of the sale or assignment of the office of side clerk at common law untouched, unless the point can be supposed to be set at rest by the decisions both in the Court below and on appeal in *Ellis v. Walmsley*.

The nature of the offices having been pointed out, the sale or assignment whereof is illegal, it becomes useful in the next place shortly to discover under what circumstances the Court will order money actually paid under an illegal contract, whether in respect of the sale of a public office or any other improper purpose, to be refunded; and Lord Thurlow, in *Neville v. Wilkinson*,¹ seems to have thought that in all cases where money has been paid for an illegal purpose it may be recovered back, observing, that if courts of justice mean to prevent the perpetration of crimes, it must be, not by allowing a man who has got possession to remain in possession, but by putting the

¹ 1 Bro. C. C. 547.

parties back to the state in which they were before; but there does not appear sufficient authority to warrant any thing like so broad a proposition,¹ although generally a party applying to set aside a contract is oppressed or imposed on, and on that account entitled to relief.² It is a general rule of law, that where money is paid by one of two parties to an illegal contract to the other, in a case where both parties are *participes criminis*, an action cannot be maintained, inasmuch as *in pari delicto potior est conditio defendentis*³, but to this rule there are several exceptions, as for instance, where a contract is contrary to a prohibitory statute made for the purpose of protecting one set of men from another, and money had been paid under such contract by the party who from his situation is liable to be imposed on by the other,⁴ such party is not considered as standing *in pari delicto*, and may bring his action after the completion of the transaction; and so it is in cases of usury; and it often happens that two parties concur in an illegal act without being deemed to be *in pari delicto*, thus, in *Goldsmith v. Bruning*,⁵ a marriage brokerage case, the defendant who obtained money by the sale of her influence must have been considered as more criminal than the purchaser, and was therefore decreed to refund; and in a case⁶ where a father, upon the allowed sale to his son of the command of a post-office packet, obtained from his son an illegal agreement to permit him, the father, to receive the profits, it was held, that the executrix of the son was entitled to an account of the profits against the executors of the father as if no such agreement had been made. And where an agreement, as for the sale to another of an office involving great trust and confidence, or connected directly with the administration of justice, is objectionable on grounds of public policy, an application in a Court of Equity to set it aside will be entertained at the instance of the parties to it, the relief being given not

¹ *Drummond v. Deeg*, 1 Esp. 152; *Brent v. Stokes*, 4 T. R. 561.

² *Osborne v. Williams*, 18 Ves. 383.

³ *Selwyn's N. P.* 94; *Bulwer's N. P.* 181, 182; *Hanson v. Hancock*, 8 T. R. 575; *Cannan v. Bryce*, 3 B. & A. 179.

⁴ *Smith v. Bromley*, Dougl. 696, n; *Williams v. Headley*, 8 East, 378; *Wilkinson v. Kitchen*, Ld. Raym. 89.

⁵ 1 Eq. Ca. Ab. 89; 2 Vern. 392.

⁶ *Osborne v. Williams*, 18 Ves. 379; *Curwyn v. Milner*, 3 P. Wms. 293.

for their sake but for the benefit of the public; and Lord Hardwicke,¹ in the case of a contract for procuration of an office, observed, that it was urged on the part of the defendant, that the bill was brought by one of the parties to the corrupt consideration against the representative of the other who was a stranger to it, and that although an executor might have some claim to relief for the sake of providing assets, yet the Court would show no favour to either of the parties themselves; but in these cases of violations of public policy it was indifferent who stands before the Court, if the intention of the contract be evident, because the Court does not regard the state and condition of the parties so much as the nature of the contract and the public good;² but a Court of Equity will not interfere if its aid instead of discountenancing the illegal purpose would have the effect of assisting it, (except in cases of frauds on marriage where there is a wife or child who would as well as the husband be affected by the frauds,³) or of discharging the plaintiff from the consequences of an illegal act; as for instance, where the Court is called upon to annul a conveyance made to the defendant to qualify him for holding an office, or for sporting, previously to the passing of the late statute abrogating the necessity of a qualification arising from land,⁴—the guilty party, under these circumstances, must be left to the inconveniences he has brought upon himself, and can neither as plaintiff be heard to allege a fraudulent purpose, in order to limit the operation of his own deed, or to set up his own iniquity as a defence: thus, where A. and B., being partners, purchased ships with their joint property, and because B. was in parliament, the ships were registered in the name of A. only, in order that profit might be made by employing them in contracts with government, the Court held the ships to be the separate property of A.⁵ If, however, the deed can be considered as preparatory and incomplete, and the illegal purpose has not been actually carried into effect, the courts of equity have allowed a *locus penitentiæ* and permitted the party

¹ Debenham v. Ox, 1 Ves. 276; Eastabrook v. Scott, 3 Ves. 460; Shirley v. Fferrers, Jac. 67, 137.

² Gilbert v. Chadleigh, Forr. MSS., 18th July, 1748.

³ Thompson v. Harrison, 1 Cox, 344; Roberts v. Roberts, 3 P. Wms. 75, n.

⁴ Roberts v. Roberts, Daniel, 143; Brakenbury v. Brakenbury, 2 Jac. & W. 394.

⁵ See Montefiori v. Montefiori, 1 Bl. 364; Curtis v. Perry, 6 Ves. 747.

to recal the instrument;¹ and such also is the inclination of the courts of law; the rule then seems to be, that where the Court would interpose on the grounds of public policy, or to protect the interests of third persons, relief will be given to the extent of those interests at the suit of a *particeps criminis*; but the Court will not, on any ground of public policy, set the plaintiff free from his agreement if he has acted fraudulently, and cannot be considered as oppressed or imposed on.²

It appears that with reference to the delivering up of deeds and instruments to be cancelled which have been executed in favor of one party procuring a public office or for any other illegal purpose, in no cases have the courts of law authority to order such deeds to be delivered up, unless they have power to that extent given them by the *express* letter of the act of parliament;³ and therefore they cannot order annuity deeds, void under the statute 53 Geo. 3, c. 141, to be delivered up, but they set aside the warrant of attorney and judgment, over which they possess a summary authority.⁴ Frequently a party by fraud, or otherwise, has an advantage in proceeding in a court of ordinary jurisdiction, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use the advantage: in such cases, to prevent a manifest wrong, courts of equity have, from almost time immemorial, interposed by restraining the party, whose conscience is thus bound from using the advantage he has improperly gained; and upon these principles bills to restrain proceedings in courts of ordinary jurisdiction are of every day's occurrence, though the authority of courts of common law, in relation to matters of this description, has of late been greatly extended by the aid of the legislature, and a liberal exertion of their own inherent powers. In the cases of deeds, however, fraudulently obtained, the forms of proceeding in the courts of common law will not admit of such a full investigation of the matter in those courts as will enable them to do complete justice, and a court of equity will on this

¹ Ward v. Lant, Pr. Ch. 182; Birch v. Blagrove, Ambl. 265; Platamole v. Staple, Coop. 250; Ex parte Bulmer, 13 Ves. 313; Tappenden v. Randall, 2 B. & P. 467.

² Bromley v. Holland, 7 Ves. 17.

³ Bromley v. Holland, 7 Ves. 18.

⁴ Dalmar v. Barnard, 7 T. R. 248; Steadman v. Purchase, 6 T. R. 737.

ground interfere to restrain proceedings at law, until the matter has been properly investigated; and if it finally appear that the deed has been improperly obtained will compel the delivery and cancellation thereof, or order it to be deposited with the proper officer of the Court, as the circumstances of the case may require.¹ It has been sometimes doubted, whether a court of equity ought to compel the delivery and cancellation of an instrument which ought not to be enforced, and whether the more proper course would not be to restrain the use of the instrument, as was done in the well known case of *Hanington v. Du Chastel*,² where the Court declined ordering the bond to be delivered up to be cancelled as was prayed by the bill, but granted a perpetual injunction against taking any proceedings upon it. But if the instrument ought not to be used, it is against conscience for the party³ holding it to retain it, as he can only retain it for some sinister purpose; and in the case of a negotiable instrument it may be used for a fraudulent purpose to the injury of a third person. Of a forged instrument, a court of equity ought to take the custody, and in such a case the instrument has been ordered to be deposited with an officer of the Court.⁴ At law, with the exception already stated, in the case of a warrant of attorney, there is no jurisdiction to order the security to be vacated, and the contracting party must, at the risk of losing the evidence of his defence, wait till the holder of the security thinks fit to bring an action, and should he be nonsuited he will still be at liberty to proceed *de novo* on his security; the mere discovery, therefore, of the fraud or illegality is insufficient for the protection of the plaintiff, nor can his ability to defend himself at law be a valid objection to the more perfect relief in equity,⁵ and more particularly where the legal invalidity of the instrument is not apparent on the face of it, but requires evidence aliunde as in the case of a bond given to secure to one creditor the deficiency of a composition, which is bad only as it is proved

¹ *Mitford* p. 104; *Franco v. Bolton*, 3 Ves. 368.

² 2 Sw. notes, p. 158.

³ *Hayward v. Dinsdale*, 17 Ves. 112.

⁴ *Bromley v. Holland*, 7 Ves. 16—21; *Ryan v. Macmath*, 3 Bro. C. C. notes, p. 16—18; *Peake v. Highfield*, 1 Russ. 559.

⁵ 2 Cox, 264; *Pierce v. Webb*, note to 3 Bro. C. C. 16.

aliunde that it was intended to be kept secret;¹ and in cases of negotiable instruments it is still more necessary for the Court to interfere, not only to enforce a discovery in aid of an action, but to relieve the plaintiff from danger and the vexation of a suit, by giving him possession of the instrument. A bill therefore improperly given by a partner in the name of the firm to secure a private debt will be decreed to be delivered up to be cancelled, and that without sending the case to a court of law if the facts be indisputably clear.² Where the legislature has declared certain instruments to be void, a court of equity will give supplementary relief by ordering the delivering up of the instrument where the statute has not authorized the exercise of any such authority by a court of law,³ as in the instances of securities void under the statutes against gaming⁴ and usury; and so an annuity deed will be decreed to be delivered up to be cancelled, not only where it is set aside as fraudulent and oppressive on account of inadequacy of consideration, but also where it is void⁵ under the act for want of a perfect memorial, and this after the failure of an application to a court of law for a like purpose.⁶

Instruments suspected to be forged will be ordered to be deposited with the registrar⁷ and preserved with a view to the prosecution of the offender; but a court of equity will not in general order a power of attorney, which is a revocable instrument, to be delivered up,⁸ nor does there appear to be any instance where a voluntary conveyance has been decreed to be delivered up in favour of a subsequent purchaser, probably because it is good as against the grantor.⁹ Fraud in obtaining a reversionary presentation to a living is considered as a fit subject to be left to the jurisdiction of the Ecclesiastical

¹ Jackman v. Mitchell, 13 Ves. 587.

² Newman v. Milner, 2 Ves. jun. 483; Jervis v. White, 7 Ves. 483. See 8 Pri. 689, and 2 Sw. 544.

³ 7 Ves. 22.

⁴ Rawdon v. Shadwell, Amb. 268; Wynne v. Callender, 1 Russ. 293.

⁵ See cases passim, 5 Ves. 605, 610, 623; 2 Sw. 157; 1 Sim. 153.

⁶ Angel v. Haddon, 2 Mer. 164.

⁷ Winchester v. Fournier, 2 Ves. 445, 446; Jones v. Jones, 3 Atk. 110; Fonbl. Eq. 328, n.

⁸ 7 Ves. 28.

⁹ Oxley v. Lee, 1 Atk. 625.

Court,¹ though if the validity of the presentation be questionable, a court of equity has authority to issue an injunction to stay institution. In *Jones v. Frost*,² upon a bill to have a pretended will, against the validity of which the Ecclesiastical Court had decreed, delivered up to be cancelled, relief was refused, because the will, having been declared a nullity by the proper Court, could never be made use of; but this has been considered an insufficient reason in many of the cases already cited of instruments declared to be void or fraudulently obtained; and Lord Eldon has observed,³ that where a will has been declared by a competent tribunal to be totally invalid, he would not say there were not cases in which the heir at law might not apply to have such delivered up as an instrument which ought not to be a cloud upon his title.

F. I. H.

ART. VII.—THE PRISONERS' COUNSEL BILL.

Letter to the Right Hon. Lord Dacre, Chairman of the Quarter Sessions of Hertfordshire, on the Prisoners' Counsel Bill. By Frederic Calvert, Esq., Barrister at Law. London, 1836.

THE Prisoners' Counsel Bill has attracted much more of the public attention than is usually bestowed on legal matters, and it was our intention to discuss the subject in all its bearings, but we have unfortunately procrastinated that intention till it is too late to act upon it effectually, in the hope of being able to write without the fear of the Lords before our eyes. The minutes of evidence given before the Committee of the Upper House have been hitherto strictly confined to the Peers constituting that Committee, and we are thus prevented from availing ourselves of the conclusive testimony of Mr. Charles Phillips and Lord Wharncliffe, which (particularly Mr. Phillips') are admirably adapted to clear up the prevailing errors as to the Bill. At present

¹ *M'Namara* . —, 5 Ves. 824.

² 5 Ves. 830; 3 Madd. 8; Jac. 467.

³ *Pemberton v. Pemberton*, 13 Ves. 298.

its opponents labour under great disadvantages. The arguments in favour of the change are all of a catching, popular, and easily-intelligible sort, and have been brought forward both in and out of Parliament by speakers and writers the best qualified to make the most of them. As regards popular impression, for example, the eloquent appeals of Lord Abinger and Mr. Horace Twiss in the debate of 1824, were ineffectually, though most ably, encountered by the dry practical conclusions of the solicitor-general of the day (Sir N. Tindal), and the blow was followed up by a sparkling article in the *Edinburgh Review*, generally understood to be from the pen of the Rev. Sydney Smith, whose unrivalled humour is almost invariably made subservient to his reasonings, and results, in fact, in nine cases out of ten, from the clearness and fulness with which the *reductio ad absurdum* is made out. But a large proportion of the profession (including three-fourths of the judges) are still unconvinced, and as it seems probable that no future opportunity will be afforded us, we will briefly indicate the principal grounds on which their opposition is based.

In the great majority of criminal trials, the question for the jury is a very simple one, whether the prisoner has or has not committed an ordinary offence; the circumstances of presumption (where presumption is necessary) are such as are daily occurring in the common intercourse of life—those cases of circumstantial evidence which excite the imagination of the public, being in actual practice exceedingly rare,—and all the material bearings of the facts almost invariably suggest themselves, or are suggested in the examination and cross-examination of the witnesses. We would appeal to any sensible man who has been in the habit of attending courts of justice, whether by the time the defending counsel has asked a few questions, the nature of the meditated defence has not generally become clear to every one; we would likewise appeal to him to declare, whether, in the generality of cases, he has entertained a suspicion that the prisoner has been unfairly treated, or that his position would have been bettered by a speech. Mr. Sydney Smith thinks otherwise, or at least leads his readers to think otherwise, for we cannot help fancying that he himself is not deceived by the fallacy :

“ The particular improvement, of allowing counsel to those who are accused of felony, is so far from being unnecessary, from any extraordinary indulgence shown to English prisoners, that we really cannot help suspecting, that not a year elapses in which many innocent persons are not found guilty. How is it possible, indeed, that it can be otherwise? There are seventy or eighty persons to be tried for various offences at the Assizes, who have lain in prison for some months; and fifty of whom, perhaps, are of the lowest order of the people, without friends in any better condition than themselves, and without one single penny to employ in their defence. How are they to obtain witnesses? No attorney can be employed—no subpoena can be taken out; the witnesses are fifty miles off, perhaps—totally uninstructed—living from hand to mouth—utterly unable to give up their daily occupation, to pay for their journey, or for their support when arrived at the town of trial—and, if they could get there, not knowing where to go, or what to do. It is impossible but that an human being, in such an helpless situation, must be found guilty; for as he cannot give evidence for himself, and has not a penny to fetch those who can give it for him, any story told against him must be taken for true (however false); since it is impossible for the poor wretch to contradict it. A brother or a sister may come—and support every suffering and privation themselves in coming; but the prisoner cannot often have such claims upon the persons who have witnessed the transaction, nor any other claims but those which an unjustly accused person has upon those whose testimony can exculpate him—and who probably must starve themselves and their families to do it. It is true, a case of life and death will rouse the poorest persons, every now and then, to extraordinary exertions, and they may tramp through mud and dirt to the assize town to save a life—though even this effort is precarious enough: but imprisonment, hard labour, or transportation, appeal less forcibly than death,—and would often appeal for evidence in vain, to the feeble and limited resources of extreme poverty. It is not that a great proportion of those accused are not guilty—but that some are not—and are utterly without means of establishing their innocence. We do not believe they are often accused from wilful and corrupt perjury; but the prosecutor is himself mistaken. The crime has been committed; and in his thirst for vengeance, he has got hold of the wrong man. The wheat was stolen out of the barn; and, amidst many other collateral circumstances, the witnesses (paid and brought up by a wealthy prosecutor, who is repaid by the county) swear that they saw a man, very like the prisoner, with a sack of

corn upon his shoulder, at an early hour of the morning, going from the barn in the direction of the prisoner's cottage! Here is one link, and a very material link, of a long chain of circumstantial evidence. Judge and jury must give it weight, till it is contradicted. In fact, the prisoner did not steal the corn; he was, to be sure, out of his cottage at the same hour—and that also is proved—but travelling in a totally different direction,—and was seen to be so travelling by a stage-coachman passing by, and by a market-gardener. An attorney with money in his pocket, whom every moment of such employ made richer by six-and-eightpence, would have had the two witnesses ready, and at rack and manger, from the first day of the assize; and the innocence of the prisoner would have been established: but by what possible means is the destitute ignorant wretch himself to find or to produce such witnesses? or how can the most humane jury, and the most acute judge, refuse to consider him as guilty, till his witnesses *are* produced?¹ We have not the slightest disposition to exaggerate, and, on the contrary, should be extremely pleased to be convinced that our apprehensions were unfounded; but we have often felt extreme pain at the hopeless and unprotected state of prisoners; and we cannot find any answer to our suspicions, or discover any means by which this perversion of justice, under the present state of the law, can be prevented from taking place. Against the prisoner are arrayed all the resources of an angry prosecutor, who has certainly (let who will be the culprit) suffered a serious injury. He has his hand, too, in the public purse; for he prosecutes at the expense of the county. He cannot even relent; for the magistrate has bound him over to indict. His witnesses cannot fail him; for they are all bound over by the same magistrate to give evidence. He is out of prison too, and can exert himself.

“The prisoner, on the other hand, comes into Court, squalid and depressed from long confinement—utterly unable to tell his own story from want of words and want of confidence, and as unable to produce evidence from want of money. His fate accordingly is obvious;—and that there are many innocent men punished every year, for crimes they have not committed, appears to us to be extremely probable.”—*Edin. Rev.* vol. xlv. pp. 76, 77.

There are expressions in this paragraph explicit enough to acquit the writer of any intention to contend that the disadvantages enumerated by him are attributable to this one particular defect (assuming it to be one) in our law; but his readers

¹ Would a speech produce them?

might well suppose such to be his intention, and it is therefore necessary to put them on their guard. The disadvantages enumerated are the natural inevitable disadvantages of poverty, suffering from suspicion, neglect, depression and want of counsel in trouble, as it suffers from cold, hunger, and want of medicine in disease. The real remedy for this state of things, (though for the present we suspend our opinion of its practicability,) is pointed out by Mr. Calvert, the author of the able pamphlet prefixed to this article, who suggests that agents should be employed at the public expense to inquire into criminal charges on behalf of the prisoner. Until something of this sort shall be done, the alleged inequality will remain, and would certainly be not a little aggravated by permitting counsel to make speeches; for the immediate effect would be to make trials more and more dependant upon advocacy, and the best advocacy would be ordinarily on the side of the prosecution, because the prosecutor is ordinarily the richer party, and has the first choice to boot.

From an intimate acquaintance with the constitution and habits of the bar, we are able to divine with confidence the class of men by whom this ægis is to be upheld,—young, rash, inexperienced, and anxious to attract attention by a flashing oration, or a burst of indignation against the prosecuting leader or the judge, and we really tremble to think of the intemperate scenes that will be presented, and the shocking consequences that may ensue; unless indeed the practised leader opposed to the raw junior, should be frequently induced to imitate the forbearance of Erskine, who once threw a slip of paper across the table to his adversary—"Don't press that question, or, by G—, you'll hang your man." But if the proposed measure passes, all motive to forbearance is at an end, and the weakest must go to the wall when the full strength of each party is put forth. We shall be told of the analogy to civil cases, where truth is said to be elicited by the contention of the bar; but the things thus classed together are essentially distinct, and the superficial analogy that does exist affords no foundation whatever for the argument. A practice or an institution may be admirably adapted for civil procedure, and extremely ill adapted for criminal. Thus, an opinion is rapidly spreading amongst the most enlightened

jurists (especially in America), that juries are radically unfit for the determination of civil causes; but no one has yet ventured to contend that prisoners should be left altogether at the mercy of the bench. The distinction must be obvious to every one, and as regards the present question, also, the distinction is obvious enough. We quote from Mr. Calvert's pamphlet:—

“ Before I enter upon the subject, I wish to mention one or two arguments, founded upon analogy, to which it seems to me that far too great weight has been attributed. It has been said, that because a speech is allowed in *cases* of misdemeanor, it ought, therefore, to be allowed in *cases* of felony. I admit the absurdity of the distinction, and should wish to see it removed; but, I would suggest, that the cure lies not in giving a speech for the defence in a trial for *felony*, but in taking it away in a trial for misdemeanor.

“ Again, it has been urged that as a speech is allowed to a defendant on a civil trial, it ought also to be allowed to a prisoner in a criminal trial. There are, however, points of material difference between the two proceedings. There is a difference in the subject-matter to be tried. In civil cases, even of the very simplest nature, some explanation is always necessary. The commonest transactions in commercial life, and the most ordinary subjects of investigation concerning landed property, are such, that they cannot be made intelligible to the jury without some extraneous assistance. On the other hand, the subject-matter of criminal trials is almost always familiar to their minds. The place, the means, the motives, the consequences, are far better understood by them than by the counsel themselves. . . . It seems to me that our law recognizes most explicitly this difference between civil and criminal proceedings, and the far greater difficulty which is inherent in the former; for the most ordinary civil case must be tried by a person of legal education, and generally speaking by one of the judges of the land; and yet a person who has received no legal education at all may preside at any criminal trial, however grave and intricate, for which the punishment is less than capital.

“ There is also the greatest difference in the several results of the two kinds of trial. Damages are a matter completely of discretion, to be determined by a very accurate acquaintance with the precise nature of the injury sustained, of the circumstances in which the parties are placed, and of their general conduct. They are altogether a matter of degree. Not so the result of a criminal trial. It involves no question of degree, no measure of evil to be taken by the juryman's discretion. The prisoner either did, or did

not do the act. If he did, the simple fact is to be found, that he is "guilty;" if he did not, the jury have only to pronounce their verdict of "not guilty."

There are other considerations which weigh with us yet more than the above. It is our firm conviction that truth is, after all, most imperfectly elicited by the contention of the bar; the side that wins may be the right side, but it often, too often, wins by tact, by trickery, by manœuvring, by chance. Talk over their field-days with the leaders of the bar, and you will be told repeatedly that the verdict hung trembling in the balance from circumstances wholly independent of the merits, and was won or lost eventually, not by soundness of argument or weight of proof, but by exciting or soothing some prejudice of the jury or the judge, by suppressing or injudiciously producing a document, by calling evidence and giving, or keeping back evidence with the view of preventing, the reply. Special retainers at six or seven hundred guineas a piece do sound exorbitant, but if the advocate be well selected, the money is not unprofitably bestowed.

We are not, however, for doing away with counsel's speeches in civil cases, because, with all their tendency to mislead, we believe them to constitute a less evil than the state of ignorance and uncertainty in which both judge and jury would be left without them; and, what is more important, parties in civil cases are pretty nearly on a par as regards their means of retaining counsel, whilst prosecutor and prosecuted in criminal cases can never be so under any system likely to be constructed prior to the advent of the millennium. It is no answer to say that counsel may be assigned by the Court, for the best would be otherwise occupied; and if required to leave a profitable harvest in the *Nisi Prius* Court to attend to the defence of a prisoner, we fear they would unwittingly be led to treat him much as barbers in Catholic countries are said to treat the travelling friars, when required to shave them *pour l'amour de Dieu*. In a word, giving the right of speech-making to the opposing parties in a criminal prosecution in their existing state of inequality, is something like giving swords to combatants, one of whom is a master of his weapon, whilst the other is wholly ignorant of fence.

It has been urged by those who are not familiar with the practice of our courts, that the prosecutor has a sword already,

in the opening statement which his counsel is occasionally permitted to make; but this privilege is very seldom allowed, and uniformly exercised (when allowed) under restrictions which prevent its being what is commonly understood by an accusatory speech.¹ The judge always checks the slightest approach to advocacy, and the counsel would lay himself open to very serious reproach who should attempt to compass indirectly, what is equally contrary to the spirit and the letter of the law. Mr. Calvert seems to think that even this opening statement may be advantageously done away with:

“In answer to these suggestions, it may perhaps be said, that there are some criminal trials of such complicated circumstances, that the jury cannot understand the evidence without some previous explanation. It may prove so upon the experiment: and yet there have been many trials of complicated facts, in which the jury, without the assistance of any speech at all, have returned correct verdicts. If, however, it should be found that some previous statement is required, let an experiment be made upon the example of the Scotch Courts, let a statement merely of the mode in which the offence is supposed to have been committed be drawn up by the prosecutor's attorney, produced in the presence of the prisoner's attorney to the grand jury; and after receiving their sanction, and that of the judge, and such alterations as may be suggested, with a view to make it fair and clear, let it be read to the jury by the clerk of the court. The judge, when he charges the grand jury, may point out to them the particular instances in which this statement will be requisite.

“Those who are acquainted with the practice in the Scotch Courts, have reported that, under the Scotch system, no speech is made before the evidence is given; that the indictment, which contains such a statement as has been mentioned, is considered a sufficient opening; and no cases ever occur in which any further opening on the part of the prosecutor is found necessary; and that the jury, being in possession of the indictment, are fully able to follow the evidence laid before them.”

If some plan of this sort were adopted, the prisoner would generally be able to meet all points of the accusation by a written defence, which his counsel may even now prepare for him.

¹ Lord Wharncliffe's evidence puts this matter in the proper point of view.

These suggestions will probably come before the Criminal Law Commissioners, and with little confidence in these gentlemen as a body (much to our regret, as we have the highest possible respect for the individual judgment and acquirements of most of them), we would rather leave the measure to them, to be worked up as part of any scheme of practice they may hereafter think proper to propose, than have the alteration effected now at the risk of revolutionizing the whole administration of justice, both civil and criminal, at a blow. Mr. Sydney Smith has said, "We are surprised that such a measure does not come into parliament, with the strong recommendation of the judges. It is surely better to be a day longer on the circuit, than to murder rapidly in ermine." But is it better to be a month longer on the circuit for no other purpose than to increase the probabilities of murdering? Is it better to have twenty-eight judges to do badly what is now done well by fourteen? These questions of ours are just as much to the point as Mr. Sydney Smith's, and are only liable to one and the same objection—that they beg the whole matter in dispute. He thinks that no additional time will be required: Mr. Phillips thinks differently, and as three speeches are to be made in each case, we believe Mr. Phillips' calculation—that the time now required for trying prisoners would be doubled, to be just. We lay no great stress on the circumstance—but it may quicken the apprehensions of peers and county members to learn, that the additional expense of keeping prisoners and witnesses at the assizes will nearly double the burthen of county rates.

H.

DIGEST OF CASES.

COMMON LAW.

[Comprising 2 Adolphus & Ellis, Part 3; 5 Nevile & Manning, Parts 2 and 3; 2 Bingham's New Cases, Part 3; 2 Scott, Part 1; 5 Tyrwhitt, Part 3; 1 Tyrwhitt & Granger, (in continuation of Tyrwhitt), Part 1; 2 Crompton, Meeson & Roscoe, Parts 3 and 4; 4 Dowling's Practice Cases, Part 3; and a selection from 7 Carrington & Payne, Part 1:—all Cases included in former Digests being omitted.]

ACT OF PARLIAMENT.

1. (*Construction of local act—Claim for compensation, when to be made.*)

By a local act, a company was empowered to take lands (with an exception of *mines*) for a railway, paying the value of the lands, and making compensation for damage sustained by reason of the execution of the works, and for damage, loss, or inconvenience, sustained by reason of the execution of any of the powers of the act; such value and compensation to be fixed by agreement, or assessed by a jury; mines to be worked by the owner, *so that no damage were thereby done* to the railway; and in case of damage, the owner to repair it at his own expense, or the company to repair in case of neglect or refusal, and recover the expenses from the owner. The owner of land taken by the company, and for which compensation is paid, cannot, on afterwards discovering that a mine to which he is entitled cannot be worked without damage to the railway, claim further compensation in respect of the loss sustained thereby; compensation in respect of such contingent loss should have been claimed at the time of the original agreement or assessment.—*The King v. The Leeds and Selby Railway Company*, 5 N. & M. 247.

2. (*Construction of—Compensation.*) Where an act of parliament provided that a waterworks' company should make compensation for damage done in executing the works, and those works were restricted to a particular line: Held, that damage done in executing the works was within the proviso, though the property injured was not within the line.—*The King v. The Nottingham Old Waterworks Company*, 5 N. & M. 498.

3. (*Conveyance of land under.*) Under a local act, proprietors of lands were authorized to "contract for, sell, and convey" their lands to a canal company: such "contracts, agreements, sales, exchanges, conveyances, and assurances," were to be valid to all intents and purposes, were to be enrolled with the clerk of the peace, and copies thereof to be evidence; and upon payment of the sum agreed on for the purchase of lands, such lands were to be vested in the canal company: Held, that a conveyance of land under this act must be in writing.—*Doe d. Robins v. Warwick Canal Company*, 2 Bing. N. C. 483.

ADMISSION.

- (*Receivable in evidence on second trial.*) Previously to the trial of an ejectment, the defendant's then attorney signed admissions, beginning, "We hereby agree to admit, on the trial of this cause," &c. On that trial, the admissions were read. The Court afterwards granted a new trial, and the attorney for the defendant died. The second trial took place on the 11th of February, and on the 7th of February, the defendant's then attorney gave notice to the plaintiff's attorney that he should make no admissions; the latter sent back an answer, stating that the admissions already made were binding: Held, that on the second trial these admissions were receivable in evidence. (1 M. & Rob. 196; 5 C. & P. 385.) —*Doe d. Wetherell v. Bird*, 7 C. & P. 6.

ADVERSE POSSESSION.

1. Where, during coverture, a lease for years is granted to the wife, and the husband survives, an adverse possession, commencing during the coverture, may be treated as a possession adverse to the wife.—*Doe d. Wilkins v. Wilkins*, 5 N. & M. 434.
2. (*Ejectment.*) A., under whom the defendant claimed, was let into possession twenty-two years before action brought, by virtue of a contract with B., for the purchase of an allotment made to B. under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. A. paid interest on a portion of the purchase-money for some years, but never completed the purchase: Held, that even after a lapse of twenty years, A.'s possession was not adverse to B.'s title. (1 B. & C. 418; 13 East, 210.)

Held also, that it did not lie in the mouth of A., or any one claiming under him, to raise as an objection to B.'s title, that the commissioners of inclosure had made no formal award.—*Doe d. Milburn v. Edgar*, 2 Bing. N. C. 498.

AFFIDAVIT.

1. (*Entitling of, on habeas corpus from inferior jurisdiction.*) Where a defendant, being in custody under civil process out of an inferior Court, is brought up by *habeas corpus*, and committed to the custody of the marshal, affidavits filed in K. B. to ground an application to discharge him out of custody, may be entitled in the cause.—*Perrin v. West*, 5 N. & M. 291.

2. Where, in an affidavit to found a motion, the addition of a deponent is omitted, the Court will not inquire whether the facts sworn to by a co-deponent are sufficient to support the application.—*Res v. Justices of Caernarvonshire*, 5 N. & M. 364.
3. To invalidate an affidavit on the ground that it was sworn before the attorney of the party, it must be stated expressly that he was the attorney in the cause at the time it was sworn.—*Beaumont v. Dean*, 4 D. P. C. 354.
4. A rule was granted on the 13th of November, to show cause on the 17th, on an affidavit having a defect in the jurat. On the 18th, an affidavit in the same terms, but having the jurat correct, was sworn. The Court, on cause being shown on the 19th, allowed the rule to be enlarged on filing the second affidavit, and paying the costs of the appearance to show cause.—*Goodricke v. Turley*, 2 C. M. & R. 637; 1 Tyr. & G. 146; 4 D. P. C. 392.
5. (*Entitling.*) "Casley, assignee, &c." is not a sufficient description of the plaintiff in the title of an affidavit. (3 D. P. C. 20.)—*Casley v. Smyth*, 4 D. P. C. 477.
6. Parties applying to the Court to set aside an order made by a judge at chambers, may use the same affidavits as were before the judge when he made the order.—*Pickford v. Ewington*, 1 Tyr. & G. 29; 4 D. P. C. 453.

AFFIDAVIT TO HOLD TO BAIL.

In an action by the indorsee against the drawer of a bill of exchange, it is not necessary, in the affidavit of debt, to allege a presentment to the acceptor, or that the drawer has had notice of dishonour. (7 Bing. 251; 2 Dowl. P. C. 689; 3 Dowl. P. C. 731.)—*Witham v. Gompertz*, 2 C., M. & R. 736; 1 Tyr. & G. 6; 4 D. P. C. 382.

AMENDMENT. See JUDGMENT; PRACTICE, 21.

ANNUITY.

(*Memorial—Proof of annual value of land—Estoppel.*) The necessity of enrolling a memorial of an annuity charged on land of which the grantor is seised in fee, is not dispensed with by a covenant from the grantor that the land is of greater annual value than the annuity, coupled with representations to the same effect made to the grantee, and by him *bonâ fide* received and acted on.

Therefore, in ejectment by the grantee, it is competent to the grantor to falsify the covenant and representation, and show that the land is of a less annual value. (9 East, 408; 2 B. & Ad. 544.)—*Doe d. Chandler v. Ford*, 5 N. & M. 209.

And see LIMITATIONS, STATUTES OF, 1.

ARBITRATION.

1. The Court will not infer that the decision of an arbitrator has proceeded solely on certain facts set out in the award, unless the award states that

the decision is founded upon those facts.—*Lancaster v. Hemmington*, 5 N. & M. 538.

2. Where an award was to be made by A., B., and C., or if they could not all agree, by any two of them, and A. said he would have nothing more to do with the business, *semble*, that B. and C. might immediately make their award, without submitting it to A. But B. and C. having, after such disclaimer by A., sent to him for his opinion on the draft of the award, which he returned with certain written objections: Held, that they were bound to take such objections into their consideration, and could not make an award differing from the draft sent to A., and not adopting his objections, without communicating to A. the terms of the award intended to be made.—*Allen v. Perring*, 5 N. & M. 374.
3. (*Conclusiveness of arbitrator's judgment.*) The defendant pleaded *non assumpsit* to an action for the board and lodging of his wife; the cause was referred to arbitration: the arbitrator admitted evidence of the wife's adultery, and decided against the plaintiff. The Court refused to set aside the award. (1 C. M. & R. 523.)—*Symes v. Goodfellow*, 2 Bing. N. C. 532.
4. (*Award, when final and certain.*) An agreement of submission recited that a rate had been made and allowed for the relief of the poor of the parish of H.; that the plaintiff, a parishioner, was rated for several messuages, &c. in aid of such rate; that the plaintiff, conceiving himself to be overrated, had given notice to the defendants, the churchwardens and overseers of the parish, of his intention to appeal against the rate at the next general sessions of the peace for the county, and that the defendants did intend to defend the same; but that, in consequence of the parties thereto agreeing to leave the examination of the rate and all matters in dispute between them, as stated in the said notices, to arbitration, no appeal was entered against the rate as by law required; and that the parties, in order to put an end to all further expense, and to prevent litigation respecting such poor's rate, and in order to settle and ascertain the subject of the said poor's rate, and the equality or inequality thereof, so far as related to the charges therein made on the plaintiff, as compared with the rate made on the other persons mentioned in the notice of appeal, had agreed to leave the same matters in difference between the parties thereto to arbitration. The agreement then witnessed that the defendants (as far as they lawfully might or could as such churchwardens and overseers,) and the plaintiff did thereby severally and respectively mutually promise and agree to abide by the award of W. A., R. D. and P. B., or any two of them, to award and determine of and concerning the above-mentioned matters in difference, and of and concerning all and every the costs, charges, and expenses of the said agreement, and the counterpart thereof, and of the said notices of appeal, and of the said churchwardens and overseers in consequence of such notices of appeal, and of their preparation to resist such appeal and to support the rate, and all matters relating thereto respectively,

the costs of the arbitration and the award to be in the discretion of the arbitrators; and it was thereby further agreed that that agreement and submission should be made a rule of the Court of K. B. The arbitrators published their award of and concerning the premises and matters to them referred, whereby they awarded that the defendants should, on delivery of that award, pay unto T. E. F., attorney for the plaintiff, 16*l.* 12*s.*, his bill already delivered, and the amount of the costs of the said T. E. F. attending that arbitration, and of the procuring the signatures of his client and the other parties to the said enlargement of time; and they further directed that the defendants should deduct from the amount charged upon the plaintiff in all future rates the sum of 10*s.*, and return to the plaintiff the sum of 10*s.* for every rate granted and paid by him since the then scheme had come into operation. The award further directed, that, as a dispute was made with regard to the quantity of the lake occupied by the plaintiff, the quantity should be ascertained by the parish, and the rate altered accordingly, agreeable to the price per acre as set against the said lake by the arbitrators in a schedule to the award. To a declaration on the above award, the defendants, after setting out the submission and award at full length, pleaded as follows:—"And the defendants in fact say, that the award is bad and void in law, and this they are ready to verify."

On demurrer to this plea, held that it was good in point of form and substance.

Held, also (Parke B. *dissentiente*), that the submission and award were bad, inasmuch as the main object of the reference, namely, the rate, was not by law capable of being referred to the decision of an arbitrator; that the costs incurred were merely incidental to the determination of the former question; and that the consideration for the submission therefore wholly failed.

Held, also, by Lord Abinger, C. B., that the award was bad, in directing the churchwardens and overseers to return and refund to the plaintiff 10*s.* on each rate made since the new scheme had come into operation, as that was not binding upon them, inasmuch as they could not by law do so, and there was no power to make them obey the award in this respect. That the direction, that the quantity of the lake occupied by the plaintiff should be ascertained by *the parish*, was also too vague and uncertain, and left it in doubt by whom it was to be done.

Parke, B., was of opinion that, notwithstanding the reference of the rate was not binding on the churchwardens and overseers, the submission and award were still valid as to the other matters in difference referred to the arbitrators; and that the ascertaining the quantity of the lake was a mere ministerial act, which might be delegated to another, and the award was not invalid in this respect.—*Thorp v. Cole*, 2 C., M. & R. 367; 4 D. P. C. 457.

5. (*Enlargement of time for award.*) *Semble*, that under the 3 & 4 W. 4, c. 42, s. 39, the Court or a judge has power to enlarge the time for an arbitrator to make his award, although the order of reference does not

contain any power to enlarge the time, and there has been no revocation of the arbitrator's authority.—*Potter v. Newman*, 2 C., M. & R. 742 ; 1 Tyr. & G. 29.

ARSON.

A stack, of which the lower part consisted of *cole-seed* straw, and the upper part of wheat stubble, Held, not to be a stack of straw the setting on fire of which would be a capital offence within the statute 7 & 8 Geo. 4, c. 30, s. 17.—*R. v. Tottenham*, 7 C. & P. 237.

ATTORNEY.

1. (*Attorney and client—Taxation of bill.*) The Court will not call upon an attorney to repay money, or to account before the Master, on the grounds merely that the attorney obtained such money from his client as if for the purposes of a suit, but that his bill is said not to account satisfactorily for the obtaining and application of such money, that the amount seems immoderate, and that the client states a case of fraud.

Procuring an attendance to be entered by a proctor in the Consistory Court, is not a taxable item in an attorney's bill.—*In re Marris*, 1 Ad. & E. 582.

2. (*Attorney and client.*) The Court will not order an attorney to pay over money received by him in his character of attorney, except on the application of the *client* to whom the money is due. No rule will be granted at the instance of a third party.—*In re Fenton*, 5 N. & M. 239.

3. (*Admission.*) The Court refused to admit an attorney on the last day of the term, on a notice of application on the third day of term ; although a similar notice had been posted during the whole of a former term.—*In re Parsons*, 5 N. & M. 241.

4. (*Summary jurisdiction over—Fraudulent retention of client's money.*) Where a rule was made absolute by consent, ordering that an attorney, who had fraudulently retained in his hands money of his client, should invest the amount by a given day, and should pay the costs of the application, otherwise that an attachment should issue against him : Held, that it was no answer to a motion for such attachment, that on the day after that appointed for the investment, a fiat in bankruptcy issued against the attorney, under which he had obtained his certificate, and that no service of the rule and allocatur took place before the bankruptcy.—*In re Newbury*, 5 N. & M. 419.

5. (*Action for bill—Taxation.*) An attorney cannot commence an action for his costs after an order obtained to tax his bill, until the taxation is completed, or the order is waived. And the omitting for three days to obtain an appointment for taxation, was held to be no waiver of such order. (2 B. & Ald. 745.—Overruling *Steventon v. Watson*, 1 Bos. & Pul. 365.)—*Sheriff v. Gresley*, 5 N. & M. 491.

6. (*Summary jurisdiction over.*) The Court will not entertain a motion touching the conduct of an attorney, unless it appears *on affidavit* that he is an attorney of the Court, or that the transaction arises, in part at least,

out of a cause before the Court: nor will the Court exercise its summary jurisdiction over an officer, unless in a case of palpable fraud.—*In re Lord*, 2 Scott, 131.

7. (*Service of rule on.*) Where it is clearly shown that an attorney keeps out of the way to avoid being served with rules for the payment of money, the Court will allow service upon his clerk to be good service. The affidavit must, however, specify the endeavours made to effect service on himself, and the reasons for believing that he is in town, and avoiding service.—*Hinton v. Dean*, 4 D. P. C. 352.

8. (*Delivery of bill.*) The assignee of an insolvent attorney need not deliver a bill signed by the attorney, before suing for business done by him.

The name of the Court in which the business is done is not required by the 3 Jac. 1, c. 7, to be stated in an attorney's bill delivered to his client: nor, *semble*, by the 2 Geo. 2, c. 23, s. 23.—*Lester v. Lazarus*, 2 C. M. & R. 665; 1 Tyr. & G. 129; 4 D. P. C. 397.

9. (*Service of rule on—Attachment.*) Under certain circumstances, where there is reason to believe that the copy, rule, and allocatur, have come to the knowledge of the defendant, an attorney, a rule *nisi* for an attachment will be granted, although strict personal service has not been effected.—*R. v. Dignam*, 4 D. P. C. 359.

10. (*Attorney and client—Inspection of documents.*) An attorney having brought an action for his bill of costs, which was defended by the client on the ground of negligence, was ordered to give the defendant a copy of the case, with the opinion of counsel thereon, (which had been procured for the defendant by the plaintiff, as his attorney,) at the defendant's expense, or to deliver up the case itself on being paid the costs which he claimed in respect of such case and opinion.—*Evans v. Delegal*, 4 D. P. C. 374.

And see JUSTICES, 2.

AUCTION.

(*Sale of lands by—Misdescription—Conditions of sale—Compensation.*)

Premises were sold by auction on this condition, amongst others:—"If any mistake be made in the description of the property, or any other error whatever shall appear in the particulars of the estate, such mistake or error shall not vitiate the sale, but a compensation or equivalent shall be settled," &c. &c. The particulars of sale described the premises as a leasehold public-house, comprising (inter alia) a small yard and wash-house, held for a term of years, at a rent of £35 a year. In fact the yard and washhouse, which were essential to the occupation of the premises, were not included in the lease, but held from year to year, at an additional rent. Held, that this misdescription was not the subject of compensation within the condition, and that it avoided the sale.—*Dobell v. Hutchinson*, 5 N. & M. 251.

And see FRAUDS, STATUTE OF, 1.

AUCTION DUTY.

A freehold estate was sold by auction, subject to a mortgage, the mortgagee

not concurring in the sale, and refusing then to receive his mortgage money. By the conditions of sale, an apportionment was to be made of the mortgage on the several lots, and the purchaser of each was to have an indemnity against the amount apportioned on the other lots. A purchaser bid the sum of 15,500*l.* for one of the lots, which was to be charged with 10,200*l.* of the mortgage money, and paid a deposit of 10 per cent. on that sum, and signed an acknowledgment that he had bought the lot for 15,500*l.*, subject to the conditions of sale: Held, that auction duty was payable, in respect of this lot, only on the balance of 5,300*l.*, that being the only amount of purchase-money actually payable to the vendor for what was bought at the sale. (2 Y. & J. 124; 3 Y. & J. 126; 1 C. & J. 434.)—*Rex v. Sedgwick*, 2 C., M. & R. 603; 1 Tyr. & G. 94.

BAIL.

1. (*Scire facias* against—Irregularity in proceedings against principal, how taken advantage of.) Irregularities in the conduct of the *ca. sa.* against the principal may be objected to on motion, in proceedings under the *sci. fa.* against the bail, as well as by plea.—*Goldney v. Laporte*, 2 Bing. N. C. 456.

2. (*Deposit in lieu of bail—Costs.*) Where the defendant deposited money in lieu of bail, under the 7 & 8 Geo. 4, c. 71, s. 2, before the time for putting in and perfecting bail had expired: Held, that he was entitled as of right to enter an *exoneretur* on the bail-piece, and that the Court could not impose on him the condition of paying costs which the plaintiff had incurred, before the money was paid in, in searching after the sufficiency of the bail. (6 Bing. 634; 3 D. P. C. 593.)—*Stamford v. McCann*, 2 C., M. & R. 632; 4 D. P. C. 367.

3. (*Deposit for costs.*) In the Exchequer, if bail have been once rejected, a deposit must be made for costs before the second set of bail justify, in the case of country as well as of town bail. (1 C. & J. 460.)

It is no objection that bail has been already rejected, unless it appear that he was rejected on the merits.—*Goodricke v. Turley*, 2 C., M. & R. 636; 4 D. P. C. 498.

4. (*Costs of opposition.*) On bail justifying (in the Exchequer), the plaintiff was allowed the costs of a former successful opposition, though he did not ask for them until after the bail had passed.—*Lewis v. Glossop*, 2 C., M. & R. 655. [The rule is otherwise in C. P.; see *Knight's bail*, 4 D. P. C. 338.]

5. (*Setting aside attachment against sheriff.*) Bail cannot apply to set aside an attachment against the sheriff, unless they first justify or render the defendant. (1 Bos. & P. 334; Tidd, 317, 8th ed.)—*Rex v. Sheriff of Lincolnshire*, in *Burton v. Gee*, 2 C., M. & R. 656; 1 Tyr. & G. 93; 4 D. P. C. 455.

6. (*Bail-bond, when to stand as security.*) The plaintiff cannot have the bail-bond to stand as a security where he has not declared *de bene esse*, although he was prevented from doing so by the vacation.—*Staines v. Stoneham*, 2 C., M. & R. 658.

7. (*Declaring de bene esse—Proceedings on bail-bond.*) Where the defendant, having given a bail-bond, does not put in special bail until more than eight days after the execution of the writ, the plaintiff may declare *de bene esse* between the expiration of the eight days and the putting in of special bail; and if he omits to do so, he is not entitled to have the bail-bond stand as a security.
The defendant cannot, after giving a bail-bond, surrender within the eight days in discharge of his bail, without putting in and perfecting special bail. (Overruling *Turner v. Brown*, 2 Dowl. P. C. 547.)—*Hodgson v. Mee*, 5 N. & M. 302.
8. (*Setting aside attachment against the sheriff.*) The sheriff took a bail-bond with one suréty only; he afterwards made a day's default in returning the writ. The Court set aside an attachment obtained against him, on payment of costs.—*Rex v. Sheriff of Surrey, in Showell v. Young*, 2 C., M. & R. 698; 1 Tyr. & G. 32.
9. (*Justification.*) After bail had justified, the plaintiff not having excepted to them, in consequence of their swearing positively that they were worth the requisite amount, the plaintiff discovered that they were both insolvent. The Court refused to compel the defendant to put in other bail.—*Lazarus v. Levour*, 4 D. P. C. 353.
10. (*Irregularity in proceedings on bail-bond, how taken advantage of.*) Where proceedings are taken on a bail-bond before default in the original action, the mode of taking the objection is by moving to set aside the writ itself, and not the service of it.—*Edwards v. Danks*, 4 D. P. C. 357.
11. (*Setting aside proceedings against sheriff—Render.*) Although rendering a defendant is equivalent to justifying bail for the purpose of setting aside proceedings against the sheriff, yet where a judge's order was obtained for time to *justify bail*, and the defendant was *rendered* instead, the Court refused to set aside an attachment afterwards obtained, except on payment of costs.—*Rex v. Sheriff of Middlesex, in Spicer v. Pearce*, 4 D. P. C. 358.

BAILMENT. See *TROVER*, 3.

BANK OF ENGLAND.

(*Liability of in trover to assignees of bankrupt for bank post bills—Branch banks.*) Held, that the assignees of A., a bankrupt, were entitled to recover in trover against the Bank of England, the amount of bank post bills converted into money by A. at a Bank of England branch bank, after notice given at the Bank of England in London that A. had committed an act of bankruptcy.

But not the amount of a bank post bill paid by A. to B. for value, after the commission of the act of bankruptcy, of which B. had no notice.

Bank post bills, issued by the Bank of England in London, are not made payable at the branch banks by 7 Geo. 4, c. 46, s. 15.—*Willis v. Bank of England*, 5 N. & M. 478.

BANKRUPTCY.

1. (*Act of bankruptcy by assignment.*) A deed whereby F., one of two traders in partnership, conveyed his separate estate to trustees for the

joint creditors of both, the joint creditors agreeing that the traders should continue in possession of their stock and carry on their business, with a view to retrieve themselves, and that upon their paying 4s. 6d. in the pound by certain instalments they should receive a general release, was held not to be an act of bankruptcy.

Held also, that it was properly left to the jury to say, whether the deed was executed *bonâ fide* to enable the traders to retrieve themselves, or executed by F. with an intent to defraud his separate creditors.—*Abbott v. Burbage*, 2 Bing. N. C. 444.

2. (*Authority of commissioners to fine for contempt.*) A commissioner of bankruptcy appointed under the 1 & 2 Will. 4, c. 56, has no power, when sitting alone under the authority of the 7th section, to fine or commit for a contempt. (See now 5 & 6 W. 4, c. 29).—*Rex v. Faulkner*, 2 C. M. & R. 525.

And see BANK OF ENGLAND.

BASTARDY BOND.

A bastardy bond, conditioned for the payment of the charges incurred "by reason of the birth, education, and maintenance of a bastard child," cannot be enforced after the bastard has attained twenty-one, and ceased to be chargeable, although he may afterwards become chargeable again.—*Wandley v. Smith*, 2 C., M. & R. 716.

BILL OF EXCHANGE.

1. (*Production of at the trial.—Pleadings.*) Assumpsit against the drawer of a cheque on a banker. Plea, that the amount was illegally won at play; and issue thereon. The plaintiff is not bound to produce the cheque, unless the defendant gives him notice to do so.—*Reed v. Gamble*, 5 N. & M. 433.
2. (*Evidence of handwriting of drawer.*) Assumpsit against the drawer and indorser of a bill of exchange. Plea, denying the drawing and indorsement. At the trial it was proved for the plaintiff that letters had been received from the defendant's place of business in the same handwriting as that in which the bill was drawn and indorsed, and also that the defendant had made an offer to compromise after action brought. For the defence three witnesses swore that the handwriting was not the defendant's. Held, that there was evidence to go to a jury that the handwriting was that of an agent of the defendant's, if not his own.—*Harding v. Jones*, 1 Tyr. & G. 135.
3. (*Acceptance and indorsement before drawing.—Drawing in wrong name.*) It was held to be no objection to the validity of a bill of exchange, in an action by indorsee against acceptor, that the acceptance and indorsement were written before the bill was drawn, notwithstanding the indorsement was made by a stranger to the acceptor. Held also, that the drawer having subscribed his name as T. W., when his name was T. W. R., was not to be deemed to have committed a forgery, unless it were proved that the omission of his surname was for purposes of fraud.—*Schultz v. Astley*, 2 Bing. N. C. 545.

4. (*Foreign or Inland.*) A bill of exchange drawn in *London*, payable to the order of the drawer in *London*, upon a merchant residing at *Brussels*, and accepted by him payable in *London*, is an inland bill of exchange, and must be stamped as such.—*Amner v. Clark*, 2 C., M. & R. 468.
5. (*Pleadings.*) Declaration on a bill of exchange drawn by N. on the defendant, requiring the defendant to pay “to *his* order” the sum therein mentioned, accepted by the defendant, and indorsed by N. to the plaintiff. Held, that the Court could see that the word “his” referred to the drawer, and therefore there was no fatal ambiguity.—*Spyer v. Thelwell*, 2 C., M. & R. 692.
6. (*Same.*) Indorsee against acceptor of a bill of exchange. Plea, that the drawer indorsed the bill to B., who indorsed it to C., in whose hands it remained when due; that C. being unable to obtain payment of it, returned it to B., who continued the holder of it until the defendant, before the indorsement to the plaintiff, delivered to B. another bill, drawn by the same party, and accepted by the defendant, for a greater amount, which B. accepted in full discharge and satisfaction of the former bill. Held, on demurrer, that this was a sufficient answer to the action, though it did not appear that the second bill was payable to order.
The plea went on to aver, that the latter bill was indorsed by B. to A., and that after it became due the defendant paid the amount of it to A., in satisfaction and discharge of that bill, and of all damages sustained by the plaintiff by reason of the nonpayment thereof when due. Held, that all this might be rejected as surplusage, and did not vitiate the plea.—*Lewis v. Lyster*, 2 C., M. & R. 704; 4 D. P. C. 377.
7. (*Pleadings.—Want of consideration.*) Assumpsit by indorsee against drawer of a bill of exchange, accepted by B. Plea, that B. being in want of a loan of money, applied to the plaintiff to advance it, which he was unwilling to do, unless B. agreed to accept it in two-thirds money and one-third wine, and unless the plaintiff had the security of a bill drawn by the defendant and accepted by B.; that B. agreed to the said terms, and thereupon the bill declared on was drawn by the defendant, and accepted by B.; and that the defendant never received any consideration or value, nor did any consideration move or pass from either of the said parties to the defendant for his drawing the bill, except as aforesaid; and that the said wine has not been delivered, and that the said contract for the sale and delivery thereof was a gross fraud on the defendant. Held bad on demurrer.—*Connop v. Holmes*, 2 C., M. & R. 719; 1 Tyr. & G. 85; 4 D. P. R. 451.
8. (*Pleadings.—Consideration.*) The case of *Easton v. Pratchett*, 1 C., M. & R. 798, 4 Tyr. 472, (Law Mag. xiii. 448,) was affirmed on error in the Exchequer Chamber.—*Easton v. Pratchett*, 2 C., M. & R. 542.

And see PRACTICE, 19, 22; WITNESS, 4.

BOND.

The case of *Beswick v. Swindells*, (5 B. & Adol. 914; 3 N. & M. 159; 12 Law Mag. 166,) was affirmed on error by the Exchequer Chamber.—*Beswick v. Swindells*, 5 N. & M. 378.

BROKERAGE.

(*Pleadings.*) Where A. employed B., a broker, to procure a charter-party on a commission of 5 per cent., to be paid whether the contract was executed or abandoned; and to an action for the amount of such commission A. pleaded payment of half the amount, and *non assumpsit* as to the residue: Held, that he could not, under these pleadings, give in evidence a subsequent agreement to accept $2\frac{1}{2}$ per cent. only, on account of the abandonment of the contract: but that where the terms of the original contract were only inferred from the usage of the trade, a conversation in which B. agreed to take $2\frac{1}{2}$ per cent. only, on account of the abandonment of the contract, was admissible to show that such contingent reduction was part of the original contract.—*Broad v. McCalmer*, 5 N. & M. 413.

BURGLARY.

1. (*Indictment.*) An indictment for burglary stated, in one count, that the prisoner "did break to get out," and in another, that he "did break and get out" of the house: Held bad, since the statute 7 & 8 G. 4, c. 29, s. 11, which uses the words "break out."—*Rex v. Compton*, 7 C. & P. 139.
2. A prisoner was indicted for burglary in the dwelling-house of J. B. J. B. worked for one W., who did carpenter's work for a public company, and put J. B. into the house in question, which belonged to the company, to take care of it and of some mills adjoining. J. B. received no more wages after he went to live in the house than before: Held, not rightly laid.—*Rex v. Rawlins*, 7 C. & P. 150.

CERTIORARI.

(*For removal of cause from inferior court.*) A plaint being levied in an inferior court, not of record, (the Hull Court of Requests,) having cognizance of debts not exceeding 5*l.*, the defendant sued out a writ, in the form of a certiorari, commanding C. to return into the Court of K. B. the plaint, and all things concerning the same. C. was not a commissioner, but only clerk, of the Court of Requests. No affidavit was filed, or order of K. B. or of a judge obtained, for issuing the writ. The Court, on motion, set it aside.—*Exp. Phillips*, 2 Ad. & E. 586.

CHEQUE. See **BILL OF EXCHANGE**, 1.

CHURCH-WARDEN.

The ordinary is bound to swear in church-wardens elect immediately on their applying to be sworn in, notwithstanding a usage not to swear in until the first visitation after Easter.

Where two sets of persons have each a colourable title to the office of church-warden, both ought to be sworn in.—*The King v. Archdeacon of Middlesex*, 5 N. & M. 494.

COGNOVIT.

(*Given by prisoner—Attestation.*) An attorney attending on behalf of a prisoner to explain and attest a *cognovit*, need not make the declaration

required by the rule of H. T. 2 W. 4, r. 72, in writing on the *cognovit*.—*Robinson v. Brooksbank*, 4 D. P. C. 397.

COMPENSATION. See ACT OF PARLIAMENT, 1, 2.

COPYHOLD.

(*Surrender to use of will*.) Where lands are held by copy of court-roll, according to the custom of the manor, they are copyhold within the 55 Geo. 3, c. 192, although they are not held at the *will* of the lord. By the special verdict it was found, that, previous to the passing of the 55 Geo. 3, c. 192, there did not appear upon the court-rolls of the manor any entry of a surrender of lands, parcel of the manor, and held by copy of court-roll thereof, to such uses as should be declared by the last will of the person making such surrender: Held, notwithstanding, that they were within the above statute. (Bro. C. C. 286; 15 Ves. 404.)

Quere, whether a negative custom that copyhold lands, surrendered to the use of a will, should not pass thereby, is good?

A testator devised all the rest, residue, and remainder of his estate whatsoever and wheresoever, and of what nature or kind soever the same might be: Held, that the words of this devise were sufficient to pass the copyhold estate; and that a copyhold estate would pass by a general devise of real estate, although the deviser had made no surrender to the use of his will.—*Doe d. Edmunds v. Llewellyn*, 2 C., M. & R. 503.

CORPORATION.

(*Right of corporator to inspect books*.) Where a canal act gave the control over the company's affairs to a committee, and authorized every proprietor to inspect the books in which the committee were directed to enter accounts, &c. the Court refused a mandamus to compel the company to permit a proprietor to inspect the books, there having been no refusal by the committee, although there had been a direct refusal by the clerk, in whose possession the books were.

So also, although, on an application to the committee, they said that they must consider the application, as it was a novel one, and inspection was afterwards positively refused by the clerk.—*The King v. The Wiltshire and Berkshire Canal Company*, 5 N. & M. 344.

COSTS.

1. (*In trespass for assault and battery*.) A plaintiff, who obtains a verdict in an action of assault and battery, is entitled to full costs if a battery be admitted on the record, although the judge certify, under 43 Eliz. c. 6, that the damages do not amount to 40s., and do not certify, under 22 & 23 Car. 2, c. 9, that an assault and battery were sufficiently proved.—*Bone v. Dawe*, 5 N. & M. 230.
2. (*In trespass qu. cl. fr.*) Since the rules of H. T. 4 W. 4, on not guilty pleaded in trespass *qu. cl. fr.*, the plaintiff is entitled to full costs, although he obtains less than 40s. damages, and there is no certificate.—*Hughes v. Hughes*, 2 C., M. & R. 663; 1 Tyr. & G. 4.
3. (*In trespass—Setting off*.) Where, in trespass against A. & B., the verdict is for A. and against B., the costs of A. may be set off against the

costs payable by B., without regard to the lien of the plaintiff's attorney, although A. & B. sever in pleading, and appear by separate attorneys. (1 Bing. N. C. 513.)—*Lees v. Kendall*, 5 N. & M. 340.

4. (*Security for.*) Where the plaintiff resides abroad, the Court, by the 98th rule of H. T. 2 W. 4, has a discretionary power to require security for costs, notwithstanding that the defendant has proceeded in the cause after he knew that the plaintiff resided abroad.—*Fletcher v. Lew*, 5 N. & M. 351.
5. (*Under 43 G. 3, c. 46.*) On moving to make absolute a rule under this statute, for depriving the plaintiff of costs, the Court will allow the defendant to refer to the judge's notes of the trial, as to the amount of the verdict, in order to supply an omission of a statement of that fact in his affidavit. And *semble*, that the fact may be ascertained by reference to the *nisi prius* record. (1 Taunt. 60; 1 B. & C. 91.)
To entitle a party to avail himself, in support of a rule, of a fact appearing on the *nisi prius* record, it is not necessary that the rule should have been drawn up as upon reading that record.—*Van Nieuwvel v. Hunter*, 5 N. & M. 376.
6. (*Authority of court over judge's certificate.*) The Court will not set aside a judge's certificate, under 43 Eliz. c. 6, to deprive the plaintiff of costs, if the judge has power to certify, although the certificate may have been granted on an erroneous ground.—*Cann v. Facey*, 5 N. & M. 405.
7. (*Under 43 G. 3, c. 46.*) An application for costs under the 43 G. 3, c. 46, on the ground that the plaintiff arrested the defendant for 35*l.*, and recovered only 19*l.* 19*s.*, is not answered by affidavits stating that the plaintiff's demand was reduced at the trial by the false evidence of a witness, who was in fact a partner of the defendant, but stated herself to be his servant only. (1 B. & C. 91.)—*Tipton v. Gardiner*, 5 N. & M. 424.
8. (*Of special case.*) On the trial of issues joined on several counts, the plaintiff recovered on one of the issues, with damages, the defendant having a verdict on the other issues. The plaintiff afterwards, in pursuance of leave reserved, moved to increase the damage by adding certain sums, and a rule being granted, a special case was stated by the parties, in which the question submitted to the Court was, whether the damages ought to be so increased. On the argument of the special case, the Court held that the damages ought not to be so increased, but directed judgment to be entered for the plaintiff on another issue, in addition to that on which the judgment was taken: Held, that the defendant was entitled to the costs of the special case.—*Gosbell v. Archer*, 5 N. & M. 523.
9. (*Of deducing title to estate.*) An abstract of a title to an estate sold by auction disclosed a conveyance in fee and a deed assigning terms to attend the inheritance, dated in 1737, (showing some terms outstanding, which occasioned considerable expense,) and a perfect title by possession for 60 years: Held, that the costs thus occasioned were allowable on taxation. Held, also, that the costs of attested copies of the will of the vendor's father ought not to be allowed.—*Exp. Quick*, 2 Scott, 184.

10. (*Of short-hand notes of evidence.*) Where, in granting a new trial, the Court directed that certain portions of the evidence should be admitted upon the proof already given: Held, that the plaintiff, who obtained a verdict, was not entitled to the costs of fair copies of the short-hand notes of the evidence, for the use of counsel; but that he ought to have applied for copies of the judge's notes.—*Crease v. Barrett*, 2 C., M. & R. 738; 1 Tyr. & G. 112.
11. (*Security for.*) Where a cause was tried, and the jury, not being able to agree in their verdict, were discharged by consent of both parties, and the plaintiff afterwards gave a new notice of trial: Held, that an application for security for costs, on the ground that the plaintiff had gone to reside abroad, was too late; it appearing that the plaintiff had been fully aware of that fact before the trial.—*Wainwright v. Bland*, 2 C., M. & R. 740; 1 Tyr. & G. 37.
12. (*Security for.*) After the defendant's arrest, the plaintiff removed his furniture and absconded to avoid a charge of bigamy: Held, that the defendant was entitled to security for costs.—*Rogers v. Banger*, 4 D. P. C. 411.
13. (*In trespass by pauper—Costs of several issues.*) A pauper plaintiff in trespass, who recovers a farthing damages, is entitled to full costs, not merely to costs out of pocket.

Where there were several issues, some of which were abandoned at the trial, the plaintiff was held entitled only to the costs of those parts of the brief, and such of the witnesses, as were necessary to the issues on which he succeeded.

The rule of H. T. 2 W. 4, r. 72, does not apply to paupers; and therefore the costs of such of the defendants as have obtained verdicts, cannot be deducted from a pauper plaintiff's costs of the cause.—*Gongenheim v. Lane*, 4 D. P. C. 482.

And see DISTRESS.

COURT OF REQUESTS.

The jurisdiction of the Westminster Court of Requests is confined to cases of debt, and it has no power to inquire into a matter which is the subject of an action on the case for unliquidated damages.—*Soames v. Rawlings*, 2 C., M. & R. 744; 1 Tyr. & G. 46.

COVENANT.

(*Action on covenants, by assignee of reversion.*) In 1762, a lessor who had an equitable estate only in a certain field, demised a portion of it to a lessee for 99 years. In 1773, the lessor having acquired the legal estate in the field, demised the residue of it to the same lessee for the same term, by an indenture which recited the former lease, and stipulated that it should continue in force, but provided that no more rent should be paid for the entire field than was paid for the first portion, and that the rent to be paid for the entire field was meant to be the same as that reserved for the first portion: Held, that the assignee of the reversion could not sue the assignee of the lessee on the covenants in the lease of

1762. (1 Saund. 233, n. 2; 1 B. & B. 513; 3 T. R. 393.) — *Whitton v. Peacock*, 2 Bing. N. C. 411.

CUSTOM.

1. (*To take profit in alieno solo, what is.*) A custom for the inhabitant landholders of a parish to dig or take from closes adjoining the sea shore, sand which had been from time to time drifted from the shore, and carried by the wind into and deposited on such closes, is bad: First, because the sand, when deposited, becomes a part of the soil of the closes, and therefore the custom is for taking a profit *in alieno solo*: Secondly, for uncertainty; it being impossible to distinguish between the soil of the original closes, and the sand from all time drifted upon it.

Quere, whether such a right might be claimed by *prescription*?—*Blewett v. Tregonning*, 5 N. & M. 234.

2. A jury cannot, *from the same evidence*, find a *customary* right in *all* the inhabitant occupiers of land within a district, and a *prescriptive* right to the same subject-matter in respect of a *particular* estate within the district. Whether, in point of law, a prescriptive and customary right to the same subject-matter may exist in respect of the same land, if each be proved by proper evidence, *quere*.—S. C., 5 N. & M. 308.

CUSTOMS ACTS.

1. Goods, the importation of which is prohibited when coming from particular places, may, under the 3 & 4 W. 4, c. 53, s. 30, be described in an information for penalties as goods liable to and unshipped without payment of duty, and the defendant may be charged with having been concerned in the unshipping, the duties not having been first paid or secured; although it appear that they were in fact imported from a place to which the prohibition applies. (1 C. & J. 159; 2 C. & J. 2; Bunb. 225; 2 C., M. & R. 170.)—*Attorney General v. Greaves*, 2 C., M. & R. 669; 1 Tyr. & G. 48.
2. The king's warehouse is a warehouse within the meaning of the 3 & 4 W. 4, c. 53, s. 44, prohibiting the illegal removal of goods from any warehouse or place of security in which they shall have been deposited.—*Lowe v. Attorney General* (in the Exchequer Chamber), 2 C., M. & R. 544.

DEBTOR AND CREDITOR.

1. (*Composition.*) To a declaration on three bills of exchange, the defendant pleaded, that he was also indebted to E. F., and to divers other persons, in divers other sums of money, of which the plaintiffs had notice; and that afterwards, and before the said bills became due, and whilst he was so indebted to the said E. F., and the said other persons, he, the defendant, became insolvent, and unable to pay his debts. That thereupon, in consideration of the premises, and with the view and intention of inducing and enabling the said defendant to induce his other creditors to accept and receive a composition of one moiety of their debts, and in consideration that the defendant would pay to them, the said plaintiffs, half the amount of the said bills, when the same respec-

tively became due, the said plaintiffs agreed to accept a composition of one half of the amount of the bills as they became due; and that afterwards the said agreement, so made and entered into by the plaintiffs, was, by the defendant, with their knowledge, and by their direction, represented and made known to the said E. F., so being such creditor as aforesaid; who thereupon, in consideration of the premises, and in faith of that agreement, was lured and induced to accept that composition; and that he, the said E. F., had not at any time since recovered or received, or sought to recover or receive, any greater or other sum than half the amount of his said debt:—Held, in arrest of judgment, that this plea was bad, inasmuch as it did not show that all, or the great body of the defendant's creditors, had come into the arrangement, and agreed to take the composition.

In order to prove the agreement stated in the plea, the defendant put in a letter from one of the plaintiffs, containing the terms of the agreement for the composition: Held, that evidence of a previous conversation, when the plaintiff made inquiries as to what the other creditors were likely to do, was admissible to show the motive which induced him to write the letter, and the intention with which the agreement was entered into.—*Reay v. Richardson*, 2 C., M. & R. 422.

DEVISE.

1. (*Description of lands—Evidence to explain ambiguity.*) A. is seised of lands in the hamlet of L., and in the chapelry of L. P. D., both being within the parish of L. He devises to B., describing him as of L. P. D., all his lands in L.—*Quere*, whether the lands in L. P. D. necessarily pass?

The register of county electors, in which L. and L. P. D. were treated as different parishes, was held not to be admissible for the purpose of disconnecting them.—*Doe d. Edwards v. Johnson*, 5 N. & M. 281.

2. (*Same.*) A. devised to B. the messuage and tenement in S., wherein he, A., then resided, with the offices, outhouses, barns, stables, and other edifices and buildings, yards and gardens, *to the same adjoining*, and all those several closes and parcels of ground called by the names of, &c. with the appurtenances, part of the farm and lands then *in his, A.'s, own occupation*: and he devised to C. all his hereditaments in S. not before devised: Held, that *cottages adjoining A.'s place of residence*, though (in some sense) separated by a wall, and not in his own occupation, passed to B.; and that evidence of declarations by A., that he meant the cottages to go to C., was inadmissible.—*Doe d. Preedy v. Holton*, 5 N. & M. 391.
3. Testator devised lands to his wife and certain trustees, in fee, in trust for his wife for life, and after her decease for the use of his three children for their lives, in equal shares, and to the issue of their respective bodies for their respective life only, in equal shares, for ever; and in case of the death of either of the three without issue, then upon trust for the survivors or survivor, in equal shares, for life only, or to their respective lawful heirs in equal shares for life only; and in case there should be only one child then living, in trust for such only child for life only, and the issue of such only

child for life, in equal shares; and if but one issue of such child, to such issue for life only, and the heirs of his or her body, for ever; in case there should be no issue of such child, remainder over. Either child who should marry was to have a power to make a settlement of his share for the lives of the parties, and the lives of their issue, with remainder over in tail. By a codicil, reciting the above devise, the testator devised the same land, after the decease of his wife, to the trustees in fee, in trust for his three children, as tenants in common, for the term of 99 years from his decease, if they or either of them should so long live; and after the determination of that term, and subject thereto, to the trustees in fee, to preserve contingent remainders: and the uses expressed in the will, as far as the law would permit, were to be carried into perfect execution: Held, that, under the will and codicil, the three children of the testator took in the lands devised estates for the term of 99 years, if they should respectively so long live, as tenants in common, with remainder to the trustees and their heirs, during the respective lives of the said three children, in trust to preserve contingent remainders, with remainder to the said three children as tenants in common in tail general, with cross-remainders between them in tail general.—*Brook v. Turner*, 2 Bing. N. C. 422.

4. (*To branches of a family.*) Devise of lands to the testator's daughter for life, remainder to her sons and daughters successively in tail, remainder to the testator's son for life, and his sons and daughters in tail: "and for default of such issue, to the *younger branches of the family* of B. W. and their heirs, to be equally divided among them, as tenants in common: and in default of such issue, to the *elder branches* of the family of B. W." (in the same terms.) At the time of the making of the will, and of the testator's death, there were living two daughters of B. W., four daughters of one of those daughters, an only son of B. W.'s eldest son, and an only son of his third son. At the expiration of the estates tail limited to the testator's grand-children, there were living many descendants of one of B. W.'s daughters, and of his third son: Held, that the devise was void for uncertainty.—*Doe d. Smith v. Fleming*, 2 C., M. & R. 638.

DISTRESS.

(*Costs recoverable in action for excessive distress.*) In an action for a vexatious and excessive distress, the plaintiff (who had received the taxed costs of his replevin on the distress) was held not entitled to recover, as damages, the extra costs occasioned to him by the replevin. (1 Bing. N. C. 500; 4 Bing. 160; 7 B. & C. 404.)—*Grace v. Morgan*, 2 Bing. N. C. 534.

And see MORTGAGOR AND MORTGAGEE.

EASEMENT.

(*Licence to obstruct windows.*) No licence or covenant from A., the owner of adjoining land, to put out, or not to obstruct, windows in the house of B., is to be inferred from the circumstance of A.'s being a party to the deed by which the house, with the windows in it, was conveyed to B., and by which A. conveyed to B. part of the adjoining land: nor from the circumstance of A.'s witnessing, without objection, the progress of the building.

The right to the unobstructed access of air and light through a window, is lost by a material alteration in the site of the wall in which the window was placed.

A., in licensing B. to build to the extremity of B.'s ground, adjoining that of A.'s, expressly reserved to himself the right of building to the extremity of his own ground, when he should think proper to do so: Held, that A. might, at any time within twenty years, build to the extremity of his own land, though he thereby rendered B.'s house dark, damp, and unhealthy. (See *Bridges v. Blanchard*, 1 Adol. & Ell. 536; 3 N. & M. 698.) — *Blanchard v. Bridges*, 5 N. & M. 567.

EJECTMENT.

1. A declaration in ejectment, intituled by mistake of Trinity term, 6 (instead of 5) Will. 4, but dated August 1, 1835: Held sufficient to warrant a rule for judgment against the casual ejector.—*Doe d. Smithers v. Roe*, 4 D. P. C. 374.
2. (*Service*.) Where the declaration was served on the son of the tenant in possession, on an affidavit that the father was in the house at the time, the Court refused to interfere, on counter affidavits that he was not at home, but absent on business, and not to avoid service; the affidavits not negating the fact that he had the declaration before the first day of term.—*Doe d. Protheroe v. Roe*, 4 D. P. C. 385.

And see EVIDENCE, 2.

ESTOPPEL.

A lessee for years covenanted to pay the rent to the lessor, his heirs and assigns, and also to deliver up possession of the demised premises, at the expiration of the term, to the lessor, *his heirs and assigns*. In an action of ejectment brought by the devisee of the lessor against the assignee of the lessee, after the expiration of the term, to recover possession of the premises: Held, that the defendant was not estopped by the covenant from showing that the lessor was only tenant for life of the property demised.—*Doe d. Strobe v. Seaton*, 2 C., M. & R. 728; 1 Tyr. & G. 19.

And see ANNUITY.

EVIDENCE.

1. (*Proof of title-deeds—Notice to produce*.) Where a title-deed, under which both parties in ejectment claim, comes out of the defendant's possession on notice to produce it, it may be read for the plaintiff without calling the attesting witness. (Gow, N. P. C. 26.)—*Doe d. Wilkins v. Wilkins*, 5 N. & M. 434.
2. (*Judgment in ejectment*.) A judgment recovered by the defendant in a former ejectment, is admissible in evidence against the lessor of the plaintiff on the trial of a second ejectment, where the lessor of the plaintiff and the defendant are the same parties.—*Doe d. Strobe v. Seaton*, 2 C., M. & R. 728; 1 Tyr. & G. 19.
3. (*Re-examination*.) Where an adverse witness, on cross-examination, volunteers evidence which would have been inadmissible as evidence in

chief, and the counsel cross-examining does not object to such evidence being admitted or retained on the judge's notes, the opposite counsel has a right to re-examine as to that evidence.—*Blewett v. Tregonning*, 5 N. & M. 308.

4. (*Examination before commissioners of bankrupt—Machine copy of letter.*) A. was examined before commissioners of bankrupt, and on his examination produced a machine copy of a letter he had sent to R. While he was before the commissioners, E., the solicitor to the assignees, made a copy of the machine copy of the letter produced by A.: Held, in an action by the assignees of the bankrupt against A., that the copy so made by E. was not admissible in evidence against A., without reading his examination, although notice had been given to A. to produce the machine copy.—*Holland v. Reeves*, 7 C. & P. 36.
5. (*Examination of prisoner before magistrate.*) Where a magistrate has signed the examination of a prisoner under 7 Geo. 4, c. 64, it is sufficient, in order to make it admissible on his trial, to prove the hand-writing of the magistrate, and to show that it is the examination of the particular prisoner.—*Rex v. Foster*, 7 C. & P. 148.
6. (*Same.*) Where a prisoner's examination before a magistrate concluded "taken and sworn before me," and under that was the magistrate's signature: Held, that it was not receivable in evidence; and the judge (Park, J.) would neither allow the magistrate's clerk to prove that in fact it was not sworn, nor receive parol evidence of what the prisoner said. (1 M. & M. 403.)—*Rex v. Rivers*, 7 C. & P. 177.
7. (*Dying declaration.*) Where a person, whose death was the subject of a charge of manslaughter, expressed an opinion that she should not recover, and made a declaration, and at a subsequent period of the same day asked a person whether he thought she would "rise again": Held, that this showed such a hope of recovery as made the previous declaration inadmissible.

It is no objection against a declaration in *articulo mortis*, that it was made in answer to questions put by the surgeon, and not a continuous statement made by the deceased.—*Rex v. Fagent*, 7 C. & P. 238.

And see INTERPLEADER ACT, 1; LIBEL, 1, 2.

EXECUTOR AND ADMINISTRATOR.

1. (*Judgment of assets quando.*) On a plea of *plene administravit prater*, the plaintiff is entitled to judgment of assets *in futuro* for debt and costs. (1 Chit. Rep. 629, n.; Tidd, 980.)—*Cox v. Peacock*, 2 Scott, 125.
2. (*Service of rule calling on executor to account.*) A rule to show cause, granted on the 42 Geo. 3, c. 99, s. 2, calling on an executor to account to the Commissioners of Stamps for the testator's personalty, was served on the executor, but after repeated attempts to serve him with the rule absolute, that service could not be effected. The Court, on a very strong affidavit of the facts, granted a rule *nisi* for an attachment, to be absolute unless cause was shown in eight days; directing that rule to be served personally.—*In re Barwick*, 5 Tyrw. 431.

3. (*Liability of to costs.*) An order to exempt an executor plaintiff from costs, after a verdict for the defendant, is a matter within the discretion either of a single judge or of the full Court; and if a judge has made such order, it cannot be reviewed by the full Court.—*Maddocks v. Phillips*, 5 N. & M. 370.
4. (*Administration—Peculiar jurisdiction.*) A metropolitan administration of goods within a peculiar, if not valid, is at least voidable only and not void. (Cro. Eliz. 719; 5 Rep. 30, n. 1; 1 Str. 671; Com. Dig. Administrator, B. 2; 3 Phill. 223; 2 Atk. 653.)—*Lysons v. Barrow*, 2 Bing. N. C. 486.
5. (*Liability of to costs.*) The Court will not relieve an executor or administrator plaintiff from costs, unless there has been some misconduct on the defendant's part, which led the plaintiff to proceed with the action, or unless some other very peculiar ground is laid for the interference of the Court. It is not enough that the action was brought *bonâ fide*, that the plaintiff had apparently reasonable grounds for suing, and that he was taken by surprise by the defence.—*Godson v. Freeman*, 2 C., M. & R. 585; 1 Tyr. & G. 35.
6. (*Action by, for breach of covenant.*) An executor is entitled to sue the lessee of his testator for the breach of a covenant not to fell, stub up, lop or top timber trees excepted out of the demise, such breach having been committed in the life-time of the testator. (Com. Dig. Administrator, B. 13, Covenant, B. 1; Bac. Abr. Executors, &c. N.; Sir W. Jones, 173; 2 Ventr. 56; 3 Salk. 109; Comb. 64; 2 Lev. 26; 1 Ventr. 176; March, p. 9, pl. 23; 9 Rep. 89, a; 1 M. & Sel. 355; 4 M. & Sel. 53; 2 M. & Sel. 408; 5 Taunt. 518.)—*Raymond v. Fitch*, 2 C., M. & R. 588.

EXTENT.

Lands having been purchased at a sale by auction under an extent, and the purchaser having resold them for a less sum than that which he had contracted to give, the Court, with the consent of the Attorney General, made an order that the name of the second purchaser should be substituted in the contract, and that the conveyances should be made to him, the original consideration being expressed in the deed.—*Rex v. Rawlings*, 2 C., M. & R. 471; 4 D. P. C. 407.

FALSE PRETENCES.

If a party obtain money by a false pretence, knowing it to be false at the time, it is no answer to show that the party from whom he obtained the money laid a plan to entrap him into the commission of the offence.—*Rex v. Ady*, 7 C. & P. 140. [It seems, however, very difficult to understand how, in such case, the prosecutor can be said to part with the money through the inducement of the false pretence.]

FERRY.

Where there is an ancient ferry from A. to B., which leads to a public highway, and another constructs a landing-place at C., a short distance from B., and carries passengers over from A. to C., from whence they pass to

the same highway upon which the ancient ferry is established, before it reaches any town or village, it is an injury to the ancient ferry, for which an action will lie.

But where there is a river passing by several towns or places, the existence of an ancient ferry over such river from a particular point on one side to a particular point on the other, does not preclude persons from using the river as a public highway from or to all the towns or places on its banks, which are not in the line leading from one *terminus* of the ferry to the other.

Where the owner of a boat, which was accustomed to ply for hire, and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion received a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master: Held, that the servant was acting at the time in the course of his master's service and for his master's benefit, and that the master was answerable for his act, and would have been liable in an action on the case for such act, if it had been distinctly proved to have amounted to an invasion of the ferry.—*Huzzey v. Field*, 2 C., M. & R. 432.

FIXTURES.

(*Pleadings*.) Trespass by lessor against lessee, for removing a cornice fixed to a freehold. Plea, that the cornice was of wood, was put up by the defendant, was fixed by screws only, was for ornament, and that it was carefully removed during the term, and all injury was amended. Replication, that the cornice was not removeable by law: Held, that the issue raised a question of fact and not of law, and that the question substantially was, whether the cornice was so fixed to the freehold that it could be removed without injury to the freehold.—*Avery v. Chesslyn*, 5 N. & M. 372.

FOREIGN ATTACHMENT. See TROVER, 2.

FORGERY.

1. Where a forged request for the delivery of goods was addressed to a female in her maiden name, she having married before the date of it; it was held that the party uttering it might be convicted on an indictment charging the intent to be to defraud the husband.—*Rex v. Carter*, 7 C. & P. 134.
2. (*Evidence—Guilty knowledge*.) In a case of forgery and uttering a forged bill, a letter written by the prisoner to a third person, saying that that person's name is on another bill of A.'s, (the prosecutor,) and desiring him not to say that that bill is a forgery, was held receivable in evidence to show the guilty knowledge.—*Rex v. Forbes*, 7 C. & P. 224.

FRAUDS, STATUTE OF.

1. (*What a sufficient note in writing*.) On a sale by auction of lands, a written contract indorsed on the conditions of sale, was signed by the purchaser only. Letters were subsequently written by the vendor to the purchaser's attorney, distinctly referring to the contract, and insisting on

the completion of the purchase: Held, that this contract and the letters together constituted a sufficient note or memorandum within the statute of frauds, to enable the purchaser to sue the vendor for the expenses of investigating the title, which proved to be defective: and that the letters might be connected with the contract for the purpose of showing of whom the property was bought, that not appearing on the face of the contract itself. (11 East, 142; 6 B. & C. 437; 1 N. R. 252; 2 B. & P. 238; Moo. & Malk. 123; 3 Taunt. 169; 1 Bing. 9.)—*Dobell v. Hutchinson*, 5 N. & M. 251.

2. (*Promise, whether original or collateral.*) The declaration stated, that H. was employed to do work on certain houses, and that defendant was employed as surveyor over him, and to receive monies to be paid to H. for such work: that, in consideration that the plaintiff would provide and deliver to H. such materials as should be required to enable him to do the work, the defendant promised the plaintiff to pay him for them out of such monies received by him as should become due to H. for the work, if H. should give him an order for that purpose. The declaration then averred, that H. gave the defendant such order, and that he required certain materials, which the plaintiff provided and delivered to him, to the value of 1000*l.*, and that that sum became due to H. for the work; of all which the defendant had notice, and was requested by the plaintiff to pay him for the materials out of such monies received by him as were due to H. for the work. Breach, that although the defendant had received 1000*l.* to be paid and then due to H., and though the said order had not been revoked, the defendant refused to pay the plaintiff. Plea, that the promise in the declaration mentioned was a special promise to answer for the debt of H., and that there was no memorandum or note thereof in writing: Held, on demurrer, that the plea was bad; for that the defendant's promise was an original and not a collateral one. (2 C. & M. 430; 3 Bing. 107; 4 D. & R. 7; 2 East, 325.)—*Andrews v. Smith*, 2 C., M. & R. 627.

FREIGHT.

The defendants chartered the plaintiff's ship from London to Buenos Ayres, there to deliver her cargo, reload, and proceed to a port between Gibraltar and Antwerp; freight for voyage out and home 1300*l.*, if delivered at Gibraltar, in Spain, London, or Liverpool; 200*l.* to be paid in London, on the departure of the vessel, the remainder on final delivery of the homeward cargo. The ship proceeded to Buenos Ayres, delivered her cargo there, and sailed again with a cargo of hides, which the defendants consigned to Gibraltar. At Fayal, the ship and about one-third of the hides were lost. The vice consul of Fayal, acting on behalf of the defendants, at the request of the captain, transmitted the rest of the hides by another vessel to the defendant's consignees at Gibraltar, where they were accepted, and the freight from Fayal to Gibraltar paid by the defendants: Held, that the plaintiff was not entitled to the 1300*l.* freight; that he was not entitled to freight *pro ratâ itineris* to Buenos Ayres, or from Fayal to

Gibraltar; but that he was entitled to freight *pro ratâ* from Buenos Ayres to Fayal.—*Mitchell v. Darthez*, 2 Bing. N. C. 555.

GUARANTEE.

One R. S., a builder, having contracted to perform certain works for government, and given a bond to the crown for the due performance of the work, in which the defendants were his sureties, applied to the plaintiff to supply him with bricks to carry on the works, which the plaintiff accordingly did to the amount of 560*l.* on the faith of the following guarantee signed by the defendants: "Please to deliver to Mr. R. S., for the completion of his contracts at Deptford and Woolwich yards, 500,000 best stock bricks, to be delivered at the said dockyards at 32*s.* per thousand; and we, as his sureties, do hereby consent that the proper officer, Navy-office, Somerset-House, who shall or may have the payment of the contract when finished, shall and may stop the amount of such account for bricks delivered; and we do hereby agree to become guarantees for the payment of the same to you, *when the amount of the contract is paid.*" After the bricks were delivered, R. S. partially performed the work, and requiring an advance of money, applied to and received from the crown, with the plaintiff's consent, 300*l.* on account. After this payment, R. S. performed extra work for the crown beyond that stipulated for in the contract, for which he was entitled to 284*l.* 5*s.* R. S. was subsequently dismissed by the crown for neglect, the contract having been only partially executed, and the crown employed other persons to complete it on their own terms, and paid them for it accordingly, without the assent of either R. S. or the defendants. After all the works had been completed, an arrangement took place between the crown and M., one of the defendants, on behalf of himself and his co-surety, and with the privity of R. S., and an account was stated by the proper officer between the crown and R. S., in which account R. S. was credited with the amount of the contract prices, and 284*l.* 5*s.* for extras, and debited with the 300*l.* paid him, and the amount paid to the persons who were employed by the crown to complete the contract, leaving the balance of 241*l.* 16*s.* 11*d.*, for which a bill was made out payable to R. S. as being "the balance upon a final settlement of all claims, which he or any one through him might have on the public, in respect of works undertaken and partly performed by him at W. and D;" which bill was given to M., who gave a receipt in the terms of the bill:—

Held, that, under these circumstances, the money paid to the persons who completed the contract was not money paid to R. S. or his agents, and the whole amount of the contract not having been paid to R. S., the plaintiff was not entitled to recover upon the guarantee.

Held, also, that even if that were not so, the plaintiff had no claim on the 300*l.* paid to R. S., as he had expressly waived it by his consent to the payment.

Held, also, that if the balance of 241*l.* was to be considered as part of the allowance for extras, the plaintiff could have no claim on that balance; and that if it was a sum partly composed of extras and partly of money due

for work done under the contract, it being impossible to say what amount was due on the latter, the plaintiff could only be entitled to nominal damages.
—*Hemming v. Treneery*, 2 C., M. & R. 385.

HABEAS CORPUS. See **INFERIOR COURT.**

HIGHWAY.

1. (*Order of justices for stopping up.*) Justices cannot make an order for stopping up part of a highway as unnecessary, under 55 Geo. 3, c. 68, s. 2, unless they have viewed the highway together; nor unless the finding that it is unnecessary be the result of that view. But it is no objection, that, previously to the view, the road had been stopped up *de facto* by the owner of the adjoining land, without legal authority.

The view is sufficiently stated on the face of the order in these terms—
“We, &c. *having upon view found, &c.*”

It is no objection to such order, that in the part of it which directs that the soil of the road to be stopped up shall be sold to the owner of the adjoining land, if he be willing to purchase, or to some other person, that the words “for the full value thereof,” occur only at the end, and not also after the part which directs a sale to the owner of the adjoining land, if willing. Nor that it does not contain any direction as to the application of the money arising from the sale. Nor that no certificate of a sale is written by the justices at the foot of the order. Nor that the owner of the land adjoining to the road stopped up, was himself, at the time of making the order, waywarden of the parish in which the road was situate. Nor that the road has become unnecessary by reason of the *substitution*, by the owner of the adjoining land, of another road over his own land, and the adoption by the public of such substituted road.

Semble, that upon motion for a *certiorari* to bring up an order of sessions confirming an order of justices for stopping up a highway, the Court cannot entertain objections to the validity of the order, whether on the ground of want of jurisdiction or otherwise, unless such objections arise on the face of the order itself.—*The King v. Justices of Cambridgeshire*, 5 N. & M. 440.

2. (*Indictment for non-repair—Evidence—Former conviction.*) On an indictment against a parish for non-repair of a highway, a plea of guilty to a former indictment against the same parish for non-repair of the same highway, is conclusive evidence that it is a public way.

Evidence that the parish did not put guard fences at the side of a road, is not receivable on an indictment charging that the king's subjects could not pass as “they were wont to do,” if no such fence existed before.—*Rex v. Whitney*, 7 C. & P. 208.

And see **MANDAMUS**, 1.

HUSBAND AND WIFE.

1. A husband is entitled to the personal property of his wife which she has acquired while living apart from him in adultery.

A woman living apart from her husband acquired a sum of money which she deposited in a bank. She married another man, and on that

occasion the money was vested in trustees for the benefit of herself and her illegitimate children. She was afterwards tried, convicted, and executed for murder. The trustees expended a considerable sum in her defence, and made an application to the bankers for the money so deposited, but it appeared that such application was not *bonâ fide* in execution of the trusts of the settlement. The first husband claimed the money, and the parties having all been brought before the Court by an interpleader rule, an issue was directed to try whether he was entitled to it, in which he recovered. The Court refused to allow the trustees their costs out of the fund, and directed that the costs of the bankers should be paid by the plaintiff (the husband), to be repaid to him by the trustees.—*Agar v. Blethyn*, 2 C., M. & R. 699; 1 Tyr. & G. 160.

2. (*Acknowledgment of married woman, in Ireland.*) The affidavit verifying the certificate of a married woman's acknowledgment, must, even in Ireland, be made before a commissioner of the Court of C. P. in England.—*In re Anderson*, 2 Bing. N. C. 435.

And see ADVERSE POSSESSION, 1.

INFANT.

(*Whether indictable for non-repair of bridge.*) An infant seised of lands in the actual possession of his guardian in socage, is not indictable for the non-repair of a bridge *ratione tenuræ*. The guardian in socage, if in possession of the lands charged (or any occupier of them) is indictable.

Whether the guardian in socage, or other owner of the lands charged, not in possession, would be also indictable, *quære*. (2 Inst. 703; Bac. Abr. Infancy (L.); Ld. Raym. 131; Cro. Jac. 99; 2 Rol. Abr. 41; 10 East, 495; 1 Rol. Abr. 392; Com. Dig. Chimin (A. 4).)—*Rex v. Sutton*, 5 N. & M. 353.

INFERIOR COURT.

(*Removal of cause from—Where cause out of Court.*) Where an action is removed from an inferior Court by writ, the cause is not *out of Court* until a year after the return of the writ by which the action is removed. Where, therefore, a party arrested in a suit commenced in a borough Court, removes the cause by *habeas* into K. B., and no further proceedings are had, the suit is not determined, so as to support an action for a malicious arrest, until a year after the return of the *habeas*. (2 T. R. 112; 3 B. & Ald. 272; Tidd, 422; Reg. Gen. H. 2 W. 4. r. 35.)—*Norrish v. Richards*, 5 N. & M. 268.

INNKEEPER.

An indictment lies against an innkeeper who refuses to receive a guest, having room in his house at the time; and it is not necessary for the guest to tender the price of his entertainment, if his rejection be not on that ground. And it is no defence for the innkeeper, that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed; nor is it any defence that the guest refused to tell his name and abode, as the innkeeper had no right to insist on knowing those particulars; but if the guest comes to the inn drunk, or behaves in an in-

decent or improper manner, the innkeeper is not bound to receive him.—*Rex v. Ivers*, 7 C. & P. 213.

INSOLVENT.

1. (*Assignment by, when valid.*) An assignment by a debtor, he being at the time in a state of insolvency, of all his property, for the benefit of all his creditors, is not void within the meaning of the 7 Geo. 4, c. 57, s. 32; *dubitante* Alderson, B.

An insolvent person being in prison, endeavoured to make terms with his creditors, they proposing that he should execute a composition-deed for their benefit, which he at first refused; subsequently a letter was written by an agent of the creditors, stating that they would not consent to his discharge, and that he must either execute an assignment or be made a bankrupt. The insolvent, after taking three days to deliberate upon it, with great reluctance executed the assignment: Held, that this was not a voluntary conveyance within the above section of the Insolvent Act.—*Davies v. Acocks*, 2 C., M. & R. 461.

2. (*Conveyance by, when valid.*) It is not necessary, in order to support a conveyance or transfer made by an insolvent trader to a creditor, to show that it was made in consequence of a pressure on the part of the creditor: in order to invalidate it, it must appear to have originated in the voluntary act of the trader, and not in a *bona fide* application by the creditor.—*Doe d. Boydell v. Gillett*, 2 C., M. & R. 579; 1 Tyr. & G. 114.
3. (*Meaning of insolvency, in agreement.*) A. and B. agreed for the sale by B. to A. of all the salt that should be manufactured at certain salt works of B.; all payments to be made quarterly, by acceptance at three months; the agreement to continue binding for fourteen years, but *bankruptcy or insolvency* on the part of A. was to terminate the contract: Held, that *insolvency* meant an inability in A. to pay his just debts, and did not import that he should have been discharged under the Insolvent Debtors' Act.—*Parker v. Gossage*, 2 C., M. & R. 617; 1 Tyr. & G. 105.
4. A party, on taking the benefit of the Insolvent Act, swore that certain goods described in her schedule belonged to the creditors of her deceased husband: but afterwards brought trover to recover them, claiming them as her own: Held, that she was not estopped by her oath from setting up a right to the goods as her own.—*Thornes v. White*, 1 Tyr. & G. 110.

And see ATTORNEY, 8.

INSURANCE.

1. (*Place of loading—Deviation.*) Under an insurance "at and from the port of loading," a loading at one single place only is authorized. Therefore, where a ship, insured at and from her port of loading in North America to Liverpool, took in part of her cargo at Cocagne, on the coast of New Brunswick, afterwards sailed to Bouctouche, another place on the same coast, and within the same legal port, and there took in other part of her cargo, and then returned to Cocagne and there completed her loading: Held, that this was a deviation which avoided her policy.—*Brown v. Tayleur*, 5 N. & M. 472.

2. (*Construction of policy.*) In a policy of insurance against fire on certain cotton mills, millwrights' work, including standing and going gear therein, engine-house adjoining and the steam-engine therein, &c., it was recited that the "buildings were brick-built and slated; warmed exclusively by steam, lighted by gas, &c., worked by the steam-engine above-mentioned; in the tenure of one firm only, standing apart from all other mills, and 'worked by day only:'" Held, that the words "worked by day only," referred to the mill only, and not to the steam-engine or any part of the gear; and that it was no breach of the policy that the steam-engine was kept going by night, and that some parts of the machinery were turned by it, the cotton mill not being worked except by day only.

One of the conditions indorsed on the policy provided, "that every insurance attended with particular circumstances of risk, arising from the situation or construction of the premises, or the nature of the trade carried on, was to be specially indorsed on the policy, so that the risk might be fairly understood, if not so expressed; or if any misrepresentation should be made, &c., or if, after the insurance should be effected, the risk should be increased by the erection of any stove, the carrying on any hazardous trade, operation, or process, or hazardous communication, the insured would not be entitled to any benefit under the policy." In an action of covenant on this policy by the assured, the defendants pleaded "that, after the making the policy, the steam-engine, in the said policy of assurance mentioned, was worked by night, and not by day only, whereby the risk in the said policy of assurance was increased:" Held, that the plea was bad, and that the plaintiff would be entitled to judgment, notwithstanding a verdict were entered up on this plea.—*Whitehead v. Price*, 2 C., M. & R. 417.

INTERPLEADER ACT.

1. (*Evidence in issue directed under.*) In an action brought by A. against B., the Court, on a motion under the Interpleader Act, made by B., directed that an action for money had and received should be brought by C. against A., to try the right to certain money: Held, first, that in an action brought in pursuance of such order, a special agreement might be given in evidence, which in ordinary cases would be admissible only under a special count.

Secondly, that in such actions the copy of an affidavit sworn by A. in the action against B., but not filed or used, in which an agreement was set out by A., and which copy A.'s attorney had admitted to be correct, might be given in evidence by C., as secondary evidence of such agreement, which was lost.

Thirdly, that in the absence of evidence to the contrary, such agreement must be taken to have been duly stamped.—*Pooley v. Goodwin*, 5 M. & N. 466.

2. The sheriff is not entitled to call a party before the Court under the Interpleader Act, on the ground of a claim set up in respect of an interest as a partner in goods seized under an execution, even though the claim

states that the balance of accounts is so much in favour of the claimant as to give him the sole beneficial interest in the property.

But where the execution creditor refused either to admit or to deny the alleged partnership, the Court enlarged the time for the sheriff's return to the writ until he was indemnified.—*Holmes v. Mentze*, 5 N. & M. 563.

3. (*Costs.*) In ordinary cases the Court (of C. P.) does not allow the sheriff his costs of applying for a rule under the Interpleader Act.—*West v. Rotherham*, 2 Bing. N. C. 527.
4. (*Denying collusion.*) A sheriff or other public officer, applying to the Court under sect. 1 of the Interpleader Act, need not deny collusion with the claimant. (2 D. P. C. 424, 509).—*Boond v. Woodall*, 2 C., M. & R. 601; 1 Tyr. & G. 11; 4 D. P. C. 351.
5. Where a new claim is set up after a rule nisi has been obtained under the Interpleader Act, the sheriff may make the new claimant a party to the rule.—*Kirk v. Clark*, 4 D. P. C. 363.

IRELAND.

(*Whether still "beyond seas."*) Ireland is in "parts beyond the seas," within the meaning of the 48 Geo. 3, c. xii. (the Bristol Dock Act), notwithstanding the Act of Union, and the 3 & 4 Will. 4, c. 41, s. 7.—*Battersby v. Kirk*, 2 Bing. N. C. 584.

JUDGMENT.

(*Amendment of mistakes in, after writ of error brought.*) The Court will allow the amendment of clerical mistakes in a judgment, on payment of costs, although one term has elapsed since the judgment was entered up, and although a writ of error has been sued out, and errors assigned, amongst other causes, on those clerical mistakes.—*Paddon v. Bartlett*, 5 N. & M. 384, note.

JUSTICES.

1. (*Power of, to revoke warrant of distress after delivery—Demand of copy and perusal of warrant.*) Where justices were empowered to settle and allow the accounts of a public officer, and in case of a neglect or refusal by such officer for fourteen days after the allowance, to pay over the balance found to be due from him, were directed, on application of the parties interested, to issue a distress-warrant for such balance: Held, that they could not, after issuing a warrant in conformity with the power given to them, but before the execution of it, order that the execution should be suspended, on the ground of an error in the settlement of the accounts, unless the parties interested consented to such suspension. For instance, they cannot do so in the case of a warrant under 50 Geo. 3, c. 49, for the balance adjudged by magistrates to be due from churchwardens and overseers at the expiration of their office.

Where the justices have so revoked a warrant without authority, and the officer afterwards executes it, he is entitled, under 24 Geo. 2, c. 44, before action brought for the taking under such warrant, to a demand of a copy and a perusal of the warrant.—*Barrons v. Luscombe*, 5 N. & M. 330.

2. (*Notice of action to—Indorsement of attorney's name and place of abode.*) A notice of action to justices, under the 24 Geo. 2, c. 44, s. 1, is sufficient, which is indorsed with the name and place of business of the attorney, although he actually resides elsewhere.—*Roberts v. Williams*, 2 C., M. & R. 561; 5 Tyr. 553; 4 D. P. C. 486.

And see *MANDAMUS*, 1.

LANCASTER COURT OF COMMON PLEAS.

Where a party, against whom judgment has been obtained in the Court of C. P. at Lancaster, has removed out of the jurisdiction, it is necessary, in order to obtain a writ of execution against him, to produce an affidavit of the fact of his removal.—*Duckworth v. Fogg*, 2 C., M. & R. 736; 4 D. P. C. 396.

LANDLORD AND TENANT.

1. (*Tenant's right to dispute landlord's title.*) The defendant, having been let into possession of premises by A., and having paid rent to him, paid one quarter's rent to B., to whom A. had agreed to demise the premises for a long term. In an action by B. for the next quarter's rent: Held, that the defendant might show that the agreement had been put an end to, and that the rent had been paid to A.—*Brook v. Biggs*, 2 Bing. N. C. 572.
2. (*Apportionment of rent.*) A. being tenant in fee, died in January, 1833, during the currency of several Lady-day and May-day tenancies from year to year, without having given notices to quit in due time, and devised to B. for life, who died in August, 1833: Held, that the administrator of B. could not recover that portion of the rent which became due between January and August, under 11 G. 2, c. 19, s. 15: for both the tenancies running during that time were created, not by him but by the tenant for life, and therefore did not determine with his (B.'s) death.—*Botheroyd v. Woolly*, 5 Tyrw. 522.
3. (*Tenant's right to dispute landlord's title.*) Before 1812, A. built a house on a piece of waste ground, and before he acquired a title to it, gave up possession to B., the tenant of the adjoining land, who held under a lease granted in 1812. B. let the house to the defendant at a yearly rent. In ejectment by B.'s landlord against the defendant: Held, that the defendant was estopped from denying the plaintiff's title.—*Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17.
4. (*Surrender by operation of law.*) The plaintiff was tenant to A. of one close; K. was tenant to B. of another close. The plaintiff and K. verbally agreed to exchange their holdings; "the plaintiff to have B.'s land, and pay K.'s rent, K. to have A.'s land, and pay the plaintiff's rent." On the same day each took possession of the other's land. K. undertook to communicate their bargain to C., who was the agent of both A. and B.: he did accordingly, some days afterwards, communicate it to C., who expressed his concurrence: Held, that this was evidence to go to the jury of a surrender by K. to B. of his interest in B.'s close.—*Bees v. Williams*, 2 C., M. & R. 581; 1 Tyr. & G. 23.

And see *ESTOPPEL*.

LARCENY.

(*From vessel in navigable river.*) The luggage of a passenger going by a steam boat is within the words "goods or merchandize," in the 7 & 8 G. 4, c. 29, s. 17, relating to the stealing of property from any vessel in any navigable river. (Fost. C. L. 77.)—*Rex v. Wright*, 7 C. & P. 159.

LIBEL.

1. (*Evidence.*) A libellous paper, in the defendant's handwriting, found in the house of the editor of a newspaper in which the libel complained of appeared, is admissible in evidence against the defendant, although several parts of it have been erased, and are omitted in the newspaper, provided the passages erased do not qualify the libel.

In order to the admission in evidence, in mitigation of damages, of libels published by the plaintiff, it must be shown with precision that such libels relate to the libels by the defendant. (3 B. & C. 113.)—*Tarpley v. Blabey*, 2 Bing. N. C. 437.

2. (*Privileged communication.*) The meaning, in law, of a privileged communication, is, a communication made on such an occasion as rebuts the *prima facie* inference of malice arising from the publication of matter prejudicial to the character of the plaintiff, and throws upon him the *onus* of proving malice in fact; but not of proving it by extrinsic evidence only; he has still a right to require that the alleged libel itself shall be submitted to the jury, that they may judge whether there is any evidence of malice on the face of it.

The defendant was the solicitor employed in an equity suit on behalf of the plaintiff, a minor. The plaintiff was desirous of changing his solicitor, and informed the defendant of it. The defendant thereupon wrote a letter to the plaintiff's next friend, (who was liable for the costs of the suit,) dissuading him from giving any directions in the matter, and alleging, among other observations on the plaintiff's conduct, that a civil engineer to whom the plaintiff had been apprenticed, had made him a present of his indentures because he was worse than useless in his office: Held, that this was a privileged communication.—*Wright v. Woodgate*, 2 C., M. & R. 573; 1 Tyr. & G. 12.

3. (*Evidence in mitigation of damages.*) In an action for a libel published in a newspaper, the defendant cannot go into evidence in mitigation of damages, to show that the same libel had appeared in another newspaper, from which the plaintiff had already recovered damages: but he may show that he copied the libel from another newspaper, and omitted several passages contained in that newspaper which reflected on the plaintiff's character.—*Creevy v. Carr*, 7 C. & P. 64.

LIEN.

(*For general balance.*) The defendants, the proprietors of a scribbling and fulling mill, stipulated that all goods on hand should be subject to a lien for a general balance. Having received certain wool and cloth of the plaintiff to be scribbled and fulled, and certain oil and dyeing materials to be used by the plaintiff on the wool, for which purpose the plaintiff had access to

the oil and dyes, in a room of which the defendants kept the key: Held, that the defendants had no lien for their general balance on the oil and dyeing materials.—*Cumpston v. Haigh*, 2 Bing. N. C. 449.

LIMITATIONS, STATUTES OF.

1. (*Operation of, an annuity given by will.*) A devisee claiming an annuity granted by a will, is not barred under 3 & 4 W. 4, c. 27, ss. 2, 3, by the lapse of twenty years, if he has never received any payment in respect of the annuity.

By the will the annuity was charged on testator's freehold, provided certain leasehold property specified in the will proved to be insufficient: Held, that even as against the annuitant, the will by itself was no evidence that the testator died possessed of leasehold property.—*James v. Salter*, 2 Bing. N. C. 505.

2. (*What is part payment, and how proved.*) The meaning of *part payment*, to take a case out of the statute of limitations, is payment of a *smaller* on account of a *greater* sum of money, due from the party making the payment to the party to whom it is made.

The appropriation of such part payment of principal, or of payment of interest, to a particular debt, may be shown by any medium of proof, and does not require an express declaration of the debtor, at the time of the payment, to establish it; it may therefore be proved by previous or subsequent declarations of the debtor: although the fact of the payment must be proved by independent evidence. (3 Y. & J. 518; 1 Stark. N. P. C. 488.)—*Waters v. Tompkins*, 2 C., M. & R. 723; 1 Tyr. & G. 137.

3. The statute 3 & 4 W. 4, c. 27, s. 42, which limits the recovery of arrears of rent to six years, has not a retrospective operation.—*Paddon v. Bartlett*, (in error,) 5 N. & M. 383.

LORDS' ACT.

1. The twenty days' notice necessary to be given before bringing up a prisoner under the compulsory clause of the Lords' Act, must have expired before the first day of the term in which he is brought up. (3 Moo. & Sc. 488; 2 D. P. C. 737.)—*Buxton v. Spires*, 2 C., M. & R. 601; 1 Tyr. & G. 74; 4 D. P. C. 365.
2. The title of an assignee, under the compulsory clause of the Lords' Act, 32 Geo. 3, c. 28, s. 16, only commences from the time when the insolvent was brought up and discharged.—*Moore v. Eddowes*, 7 C. & P. 203.

MALICIOUS ARREST. See INFERIOR COURT.

MANDAMUS.

1. (*To justices, to enforce disputed highway rate.*) The Court will not compel a magistrate by mandamus to issue a distress-warrant for a parish highway rate, under stat. 13 Geo. 3, c. 78, ss. 45, 67, made upon the occupier of lands within his district, if it appears that, in the magistrate's belief and in fact, there is a legal doubt as to the occupier being liable to contribute to the repairs of the parish highway, and that the magistrate is liable to be

sued if the warrant be granted and acted on; and this, although the occupier has not appealed against the rate.—*Rex v. Greame*, 2 Ad. & E. 615.

2. (*Same.*) On motion for a mandamus to justices to grant a distress warrant for levying a highway rate, it appeared that the rate was contested on the following grounds:—1. The lands, in respect of which payment had been refused, were part of a district inclosed thirty-five years ago by act of parliament, having none but private roads, which were repaired by the landholders, and never having been assessed to the highway rate. 2. No statute duty had been called for in respect of these lands, before making the present rate. 3. The special session, at which the order for making such rate was signed, had been convened without notice from the high constable. 4. The order was signed by two persons not stating themselves to be justices. 5. The rate was not signed.

The occupier against whom the warrant was applied for had appealed to the sessions, but he threatened the justices with an action if they granted a warrant, and the opposite party made no express offer to indemnify them.

Held, that a mandamus ought not to go, it being doubtful whether, on some of the objections, the justices might not be liable to an action if they granted the warrant.—*Rex v. Mirehouse*, 2 Ad. & E. 632.

3. (*Form of—Power of Court over—Practice in.*) A mandamus to appear and produce and explain accounts to auditors, cannot direct the parties to appear, &c. “at such time and place as the auditors may appoint and give notice thereof,” where by statute the parties are bound to appear only at a meeting directed to be held at a certain place.

The Court has power to mould the *rule* for a mandamus, but cannot remould the writ itself after it has issued, and award a peremptory mandamus in a more limited form than the original mandamus.

Where, on a motion to quash the return to a mandamus for insufficiency, and to issue a peremptory mandamus, the matter is set down for argument in the crown paper, the counsel for the crown is entitled to begin, although the counsel for the defendants propose to urge objections to the mandamus itself.—*The King v. Trustees of St. Pancras New Church*, 5 N. & M. 219.

4. (*Sufficiency of return.*) To a mandamus requiring A., a waywarden, to deliver to the churchwardens certain books of account, assessments, &c. in his custody, power or possession, it is a good return to say, that on and since the teste of the writ, A. had not nor has had the books, &c. or any of them, in his custody, power or possession. If the return goes on unnecessarily to state that he had them not on a *prior* day, on which it is surmised in the mandamus that they were demanded by the churchwardens, he is not bound to negative a possession during the interval between such demand and the teste of the writ.

Whether, under the circumstances, the books, &c. were in the power of A., is a question to be raised by a traverse to the return, or by an action for a false return.—*Rex v. Round*, 5 N. & M. 427.

MASTER AND SERVANT.

1. (*Jurisdiction of justices between.*) The provisions of the 5 Geo. 4, c. 18, apply only to cases of *penalties and forfeitures*. Therefore magistrates

have no power, under that statute, to commit a party to prison for non-payment of a sum of money adjudged by them, under the 20 Geo. 2, c. 19, 31 Geo. 2, c. 11, and 4 Geo. 4, c. 34, to be due as *wages*.

In an information before magistrates under those acts, for non-payment of wages, it should appear that the relation of master and servant, in one of the occupations therein specified, existed between the debtor and the informant. (9 B. & C. 603, 628; 7 B. & C. 536.)—*Wiles v. Cooper*, 5 N. & M. 276.

2. (*Liability of master.*) Where the owner of a boat which was accustomed to ply for hire and to carry passengers across a haven, employed a servant for that purpose, and the servant on one occasion took a passenger on board, and carried him across the haven near the line of an ancient ferry, and paid the fare over to his master: Held, that the servant was acting at the time in the course of his master's service and for his master's benefit, and that the master was answerable for his act.—*Huzzey v. Field*, 2 C., M. & R. 432.

MORTGAGOR AND MORTGAGEE.

(*Right of mortgagee to distrain—Demise under power.*) By a deed to lead the uses of a recovery, lands were limited to A. for 1000 years, and subject thereto, to B. for life, remainder to C. for 2000 years, remainder to D. for life, remainder to trustees to preserve, &c., remainder to the issue of D. successively in tail, remainder to the heirs of D. The trusts of the first term were declared to be, on non-payment by D. of 800*l.* lent to him by A., to raise that sum by sale or mortgage. The trusts of the second term were, to repay B. for any interest paid by her to A., and to raise a further sum for B. Power to B. to demise for ten years, or for seven years from her death, to take effect in possession, reserving the best rent, &c. B. demised under the power for seven years from her death to E., reserving rent to D. or to the person entitled for the time being to the freehold and inheritance: Held, that the lease took effect as an appointment under the power, in advance of the 1000 years' term. (9 B. & C. 288.)

B. and D. died: Held, that A. might distrain on E. for the accruing rent.

To an avowry by A., E. pleaded *non tenuit*: Held, that the tenure under A., created by the lease, was not negatived by showing that A. had joined with D.'s issue as co-lessor in an action of ejectment against E., which was still pending.—*Rogers v. Humphreys*, 5 N. & M. 511.

NEW TRIAL.

1. Where, in an action tried under a writ of trial, on a promissory note for two guineas, in which the requisites of the statute 17 Geo. 3, c. 30, had not been complied with, the under-sheriff directed the jury to find for the defendant, and the jury brought in their verdict, "we find that the money is due, but there is an informality in the note:" Held, that if the verdict was not so clear that it could be entered for the defendant, it amounted to a perverse verdict; and a new trial was granted, though the sum was under 5*l.*—*Owen v. Pugh*, 1 Tyr. & G. 26.
2. A rule will not be granted for a new trial on affidavits alleging that a material witness was prevented from attending the trial, without showing

some grounds for a belief that the successful party was implicated in keeping him away; and it is not enough merely to state a belief that the witness was kept away at his instance.—*Marsh v. Monckton*, 1 Tyr. & G. 34. And see PRACTICE, 15.

NONSUIT.

Where the plaintiff's counsel, after a judge has begun to sum up, proposes to be nonsuited, he cannot move to set aside the nonsuit, although the judge may have expressed a strong opinion against the effect of the plaintiff's evidence. (2 C. & J. 133; 1 B. & Ad. 145; 3 Taunt. 229; 9 Price, 291.) —*Simpson v. Clayton*, 2 Bing. N. C. 467.

NOTICE OF ACTION. See JUSTICES, 2.

OFFICE.

(*Fine for not serving office, when excessive.*) A fine of 300*l.* for not serving an office, was held excessive, where the highest previous fine was 100*l.*, which was found sufficient to produce an acceptance of the office: although since the last refusal the office had become more burdensome, and the number of persons qualified to serve it much diminished.—*Rex v. Mosley*, 5 N. & M. 261.

ORDER OF FILIATION.

The sessions cannot entertain an application by the overseers of a parish, under the Poor Law Amendment Act, for an order to charge the putative father of a bastard child, without direct proof of notice to such putative father, notwithstanding his appearance in Court.—*The King v. Justices of Carnarvonshire*, 5 N. & M. 364.

ORDER OF REMOVAL.

1. (*Notice of appeal against.*) Under section 79 of the Poor Law Amendment Act, notice of appeal against an order of removal need not be given within twenty-one days from the time of sending the notice of chargeability, and the copies of the order and examination, to the overseers of the parish charged by such order.

The practice as to notices of appeal, not being expressly altered by that act, remains as before, although, by sect. 81, the statement of the grounds of appeal is required to be delivered *with* such notice, or *at least* fourteen days before the sessions. And therefore, where, by the practice of the sessions, eight days' notice only is required, a notice of appeal given eight days before the sessions is sufficient, provided such statement of the grounds of appeal be delivered fourteen days before the sessions: at least where such statement is accompanied with the service of notice of appeal *de facto*, though such notice be erroneous, as purporting to be given for the *borough* instead of the *county* sessions.—*The King v. Justices of Suffolk*, 5 N. & M. 503.

2. By an order, unappealed against, the pauper was removed from A. to the parish of B. in the county of S. B. at that time consisted of two townships, C. and D., jointly maintaining their poor, in the county of S., and one township, E., separately maintaining its own poor, in the county of

W. After this removal, C. and D., being required by mandamus, elected separate overseers and maintained their poor separately. The same pauper was afterwards removed from A. to the township of C.: Held, that C. was not estopped by the former order.

But *semble*, it was conclusive on that part of B. parish which was in the county of S.—*The King v. Inhabitants of Oldbury*, 5 N. & M. 547.

OVERSEERS.

1. (*Overseers' accounts, adjudication of justices on.*) The adjudication of magistrates, under 50 Geo. 3, c. 49, s. 1, on the accounts of overseers and churchwardens, rendered by them at the expiration of their office, is in the nature of an *award*, and cannot be re-opened by those magistrates for the purpose of correcting a supposed mistake in the settlement of the accounts. In case of a mistake, an appeal lies to the sessions.—*Barrons v. Luscombe*, 5 N. & M. 330.

2. (*Ownership of parish land.*) By the 39 Geo. 3, c. 12, s. 17, all parish property is vested in the churchwardens and overseers for the time being. Evidence of payment of rent to the churchwardens in respect of premises within the parish, and that leases have been made by the churchwardens, in one of which the property is described as parcel of the lands of the parish church, is *prima facie* evidence that the premises were parish property. (10 B. & C. 885.)—*Doe d. Higgs v. Terry*, 5 N. & M. 556.

OYER.

(*When demandable—When waived.*) *Oyer* is demandable at any period before the time for pleading is out, though it has been extended by a judge's order on terms: unless the order expressly excepts the right to demand *oyer*. (Barnes, 241, 268, 329; 2 Wils. 413; 2 Bos. & P. 379.)

And the right is not waived by pleading, unless the plea be to the bond or other instrument of which *oyer* is demanded.

A party has not a right to have his demand of *oyer* entered of record, unless it was made regularly according to the practice of the Court.—*Goodricke v. Turley*, 2 C., M. & R. 694; 1 Tyr. & G. 149; 4 D. P. C. 431.

PATENT.

(*Specification.*) In the recital of a patent it was stated, that the patentee was the first and true inventor of certain improvements in extracting sugar and syrups from cane-juice and other substances containing sugar, and in refining sugar and syrups. The specification alleged, that the invention consisted in a means of discolouring syrups of every description by means of charcoal, produced by the distillation of bituminous schistus alone, or mixed with animal charcoal, or even of animal charcoal alone. It then alleged that the discolouration was to be effected by means of a filter made of charcoal, and that there was nothing particular in the carbonization of the bituminous schistus, only that it was "convenient before the carbonization to separate the sulphurets of iron which are mixed with it." To an action for infringing this patent, the defendant pleaded, that the patentee did not, by any instrument, particularly describe and ascertain the nature

of his invention, and in what manner the same was to be and might be performed: Held, 1st, that the specification sufficiently described the invention stated in the title of the patent, it being shown that it was applicable with advantage to the extracting of syrup from cane-juice, before it is baked to such a consistency as to granulate and become sugar. 2dly, it was proved, that sulphuret of iron was combined with the bituminous schistus found in this country; and there was no evidence to show that the presence of iron in the charcoal produced by the schistus was not injurious to the matter going through the process of discolouration: Held, that it was incumbent on the patentee to prove that the presence of iron in the bituminous schistus used in the process of filtering would not be injurious; or else, that the method of extracting the iron from it was so simple and well known, that a person ordinarily acquainted with the subject could remove it with ease; or that the bituminous schistus, as known in England, could be used in the process with advantage.—*Derosne v. Fairie*, 2 C., M. & R. 476; 5 Tyr. 393.

PAUPER. See COSTS, 13.

PERJURY. See WITNESS, 2.

PLEADING.

1. (*Plea in abatement*.—*Judgment of respondeat ouster*.) A plea in abatement, with judgment of *respondeat ouster*, need not now be entered on the issue or in the *nisi prius* record. (5 Mod. 400; Ld. Raym. 329; 1 Salk. 5; 3 Burr. 1682.)—*Pepper v. Whalley*, 5 N. & M. 437.
2. (*New assignment in assumpsit*.) In *indebitatus assumpsit*, the defendant pleads payment and acceptance in satisfaction: the plaintiff now assigns a different debt of the same amount with that confessed in the plea: *non-assumpsit* is pleaded to the new assignment. The only question for the jury is, whether two debts were incurred or one only. If, therefore, the plaintiff proves one debt, and the defendant proves payment of the amount, the effect of the defendant's evidence is to show that the debt proved by the plaintiff is the debt confessed and avoided by the plea, and not the debt newly assigned; the latter debt, therefore, remains unproved on the issue of *non-assumpsit*.—*Hall v. Middleton*, 5 N. & M. 410.
3. (*Replication de injuriâ*.) The replication *de injuriâ* is proper in *assumpsit*, where the plea consists of matter of excuse.—*Griffin v. Yates*, 2 Bing. N. C. 579.
4. Assumpsit for non-delivery of a horse under an agreement to sell him for 1s. if he did not trot eighteen miles within the hour within a month, to the satisfaction of J. N.; with an averment that he had been tried in the presence of J. N., and had failed. Plea, that after that trial, and within a month, the defendant gave notice of another trial, but J. N. did not attend: Held bad on demurrer.

The defendant also pleaded that the first trial was interrupted by a person acting as the plaintiff's servant. A replication, traversing the whole of such plea, was held single.—*Brogden v. Marriott*, 2 Bing. N. C. 473.

damage to a greater amount, in respect of so much of those causes of action as in the plea mentioned. *Quære*, whether such plea is good on special demurrer. *Semble*, the defendant ought to have shown distinctly what portion of the money paid into Court was to be ascribed to the bill of exchange.—*Jourdain v. Johnson*, 2 C., M. & R. 564; 5 Tyr. 524.

9. (*Common counts*.) The common counts are, notwithstanding the rule of *Trinity Term*, 1 Will. 4, separate counts for the purposes of *pleading*, as well as for the purposes of costs.—S. C.

10. (*In debt by assignees—Allegation of time—Demurrer, when too large*.) In debt by assignees of an insolvent or bankrupt, it need not be stated that the plaintiffs sue “as assignees;” it is enough if it sufficiently appears that they are assignees.

Assignees may declare in the *debet* and *detinet*, and the omission of the *queritur* is immaterial. (11 East, 65; 1 Saund. 112, n. 1.)

The declaration stated, that the defendant was indebted to the insolvent, before he subscribed his petition, or executed the assignment of his estate under the Insolvent Act, for goods sold and delivered by him *before he became insolvent*: Held, a sufficiently certain allegation of the time when the debt accrued.

A count, stating that the defendant was indebted to the plaintiff on an account stated between them, is bad on special demurrer, for want of an allegation of the time when the account was stated. It should be “on an account *then* stated between them.”

If there be a demurrer to the whole of a declaration consisting of several counts, and any one count is good, the demurrer is too large, and the plaintiff is entitled to judgment. (2 Saund. 379 a.)—*Ferguson v. Mitchell*, 2 C., M. & R. 687; *Spyer v. Thelwell*, ib. 692.

11. (*General issue in debt*.) In debt, the defendant pleaded that he *never did owe* the sum demanded: Held bad on special demurrer.—*Smedley v. Joyce*, 2 C., M. & R. 721; 1 Tyr. & G. 84; 4 D. P. C. 421.

12. (*Action on the case for false representation*.) A declaration in case stated, that the plaintiff (a carpenter and builder) had purchased of C. certain spruce battins, to be used by him in his trade, for 11*l.*, which sum the defendant had lent to the plaintiff for the purpose of making payment for them, and on the personal credit of the plaintiff, without any agreement that the defendant should have any lien or control over the battins as a security for its repayment; yet that the defendant, well knowing the premises, and contriving, &c. to deprive the plaintiff of the possession and use of the said battins, and falsely and wrongfully assuming and pretending that he was entitled to a lien on them, and had a right of staying and preventing the delivery of them to the plaintiff until the said sum of money should be repaid, wrongfully and maliciously, and without reasonable or probable cause, but under colour of the said pretended lien and right of detainer, directed C. not to deliver them to the plaintiff until further order from the defendant: whereby and in consequence whereof, C. being induced to believe that the defendant had such lien, &c. did, in consequence of such

- order, refuse to deliver them to the plaintiff for three weeks, whereby the plaintiff was prevented from using them in his business, and certain houses which he was then building were greatly delayed, &c.: Held, on demurrer, first, that it sufficiently appeared on the face of the declaration, that the defendant made a knowingly false claim of lien; secondly, that the special damage alleged, viz. the non-delivery of the battins to the plaintiff, was sufficiently connected with the wrongful act of the defendant, to support the action. (8 East, 1; 7 Bing. 215; 4 Rep. 18; 2 Bos. & P. 284; 1 Ad. & E. 47.)—*Green v. Button*, 2 C., M. & R. 707; 1 Tyr. & G. 118.
13. (*Evidence under general issue, in action for use and occupation.*) In an action for use and occupation, the fact of the mortgagee of the premises having given the defendant notice to pay the rent to him, may be given in evidence under the general issue, if the rent sought to be recovered in the action accrued due *after* the notice; but if the rent accrued due before the notice, this defence must be specially pleaded.—*Waddilove v. Barnett*, 2 Bing. N. C. 538; 4 D. P. C. 347.
14. (*Effect of admissions on record.*) Whether, in an action of *assumpsit*, where the plaintiff does not reply *de injuria* generally to a plea stating several facts by way of excuse, the taking issue on one of such facts entitles the jury to treat the others as admitted between the parties, *quare*.—*Noel v. Boyd*, 4 D. P. C. 415.
15. (*Pleas of payment of set-off—Particulars of demand.*) *Assumpsit* for goods sold: pleas, as to 20*l.*, payment, as to the residue, a set-off. For the defence, no evidence was given of the set-off, and payments were proved to the amount of 12*l.* 10*s.* only: Held, that on this evidence the plaintiff could only recover 7*l.* 10*s.* (as that part of the 20*l.* of which payment was not proved) and 1*s.* for the residue; and that the fact that these pleas were pleaded after the delivery of particulars of demand, which specified a claim to a larger amount, made no difference.—*Coxhead v. Huish*, 7 C. & P. 63.
16. (*Plea of payment into Court, evidence under.*) To *assumpsit* for non-performance of a contract to receive and pay for copper made to order at a specified price per lb., the defendants pleaded payment into Court of 15*l.*, and that the plaintiff had not sustained damage *ultra*: Held, that they could not give in evidence, under this plea, that they had countermanded the order when only a part of the work had been done.—*Stevens v. Ufford*, 7 C. & P. 97.
17. (*Money had and received—Defence under non-assumpsit.*) A party had by his marriage settlement covenanted to pay 1000*l.* to trustees for his children, at any time during the coverture, or within a month after his wife's death. After her death, he went to prison for debt; and while there, he gave his son and his daughter's husband an authority to sell his property towards payment of the 1000*l.* They sold it, and received 346*l.* After that, the prisoner was brought up under the compulsory clauses of the Lords' Act, and executed an assignment: Held, that, on these facts, the assignee could not recover this sum of 346*l.*; and that, in an action for money had and

received, brought by him against the daughter's husband, the defendant might give the above facts in evidence under the general issue.—*Moore v. Eddowes*, 7 C. & P. 203.

And see **BROKERAGE**; **PROHIBITION**, 1; **TROVER**, 3.

POACHING.

(*Right to apprehend poacher.*) Where a person was found poaching on the manor of A. by one of his watchers, and was pursued off the manor, and then on to it again, and there snapped his gun at the watcher: Held, that he was guilty of a capital offence within the 9 G. 4, c. 31, ss. 11, 12.—*Rex v. Price*, 7 C. & P. 178.

POOR-RATE.

(*On navigation.*) A river navigation company is to contribute to the relief of the poor in a parish through which a portion of the navigable river passes, in proportion to the profit resulting from that portion. Such profit is to be calculated at the amount of rent which a tenant would pay. When, therefore, the company receive the tolls to their own use, the amount of the repairs, and of the expenses necessary to the carrying on of the undertaking, and also a *per-centage* equal to a reasonable tenant-profit, ought to be deducted from the gross receipts, in fixing the rateable value. But no deduction is to be made in respect of burthens imposed on the profits of the navigation, or in respect of compensation payable to the owners of property injured by the navigation. (7 B. & C. 61; 9 B. & C. 68; 3 B. & Ad. 533; 4 B. & Ad. 61; 10 B. & C. 163; 1 B. & Ad. 403.)—*The King v. Inhabitants of Woking*, 5 N. & M. 395.

PORT DUTY.

The first count of the declaration stated, that the mayor and burgesses of the borough of Truro had, from time whereof the memory of man was not to the contrary, held and exercised, by the mayor of the said borough, or the lessee or lessees, farmer or farmers of the said mayor and burgesses for the time being, or their deputy or deputies, a certain ancient office or place of meter, for the measuring of all coal imported by sea and brought within the limits of the port of Truro, to be there disposed of; and that from time whereof, &c. there had belonged to the said mayor and burgesses, &c. by reason of the said office, an ancient fee, reward, or toll, for the measuring as aforesaid, and for the keeping and maintaining of measures, weights, &c. i. e. the fee, &c. of 4d. the chaldron, to be received for the measuring, or being ready and willing to measure, each chaldron of coal imported as aforesaid, to be disposed of by measure: and the fee, &c. of 8d. by the three tons, to be received for the weighing, or being ready and willing to weigh, each three tons of coal imported, &c. as aforesaid, to be disposed of by measure. The count then stated a demise by the corporation to the plaintiff of the office of meter, with the fees and privileges belonging to it, under which the plaintiff claimed a toll from the defendant in respect of a cargo of coals imported by him into the port of Truro. The second count claimed the same fee as a perquisite of the office, not stating it to be immemorial. The third count claimed a reasonable fee. Other counts claimed the toll as a duty receiv-

able by the corporation or their lessees, from all merchants importing coal by sea within the limits of the port.

The jury found a written verdict in these terms:—"We find for the plaintiff: and that the corporation of Truro have from time immemorial been possessed of, and have exercised, the office of meter, and have, from time immemorial, received for the performance of the duties of the office the sum of 4d. a chaldron on coal and culm;" Held, that the finding sufficiently supported the first count of the declaration; that it did not import that the corporation were entitled only on actually measuring the coals, and that it did not disconnect their right to the toll from their ownership of the port, and their obligation to maintain it, in respect of which ownership and obligation only they could be entitled to the payment without performing some actual service for it.

Held, also, that the toll being due to the corporation as owners of the port, as well as for the measuring, no objection could be maintained against it on the ground of its rankness.

Two leases from the corporation of the office and dues in question were put in, the first dated in 1752, (in consideration of 631*l.*) the second in 1795. It was proved that the fee of 4d. a chaldron had been paid without interruption, from the year 1772 to 1828, although the meter never actually measured them himself, the only measurement being for the purpose of ascertaining the custom-house duties payable on them. A corporation book of the date of 1630 was also produced at the trial: Held, that this was sufficient *prima facie* evidence, that the corporation and the office of meter were immemorial: and that it sufficiently supported the immemorial claim for coals not actually meted.—*Jenkins v. Harvev*, 2 C., M. & R. 393.

POWER. See MORTGAGOR AND MORTGAGEE.

PRACTICE.

1. (*Stay of proceedings on setting aside irregular judgment.*) Where a judgment irregularly signed by the plaintiff is set aside with costs, it is competent to a judge to stay the proceedings until the costs are paid; and it is no ground for rescinding such order, that the defendant has since issued an attachment for such costs. But *semble*, if the plaintiff were actually taken on such attachment, the Court would relieve him from the stay of proceedings.—*Wenham v. Downes*, 5 N. & M. 244.
2. (*Renewing application for same rule.*) Where a rule is discharged, the party is not entitled to a second rule to the same effect, on affidavits stating additional facts, which the party might have presented to the Court on the first motion.—*Rosset v. Hartley*, 5 N. & M. 415.
3. (*Staying proceedings.*)—The Court will not stay proceedings in an action on the ground that the money recovered will be held by the plaintiff in trust for the defendant.—*Barlow v. Leeds*, 5 N. & M. 426.
4. (*Judge's order.*) Where, on a summons attended at chambers, the judge indorses a minute of an order, it is at the option of the party by whom the summons was taken out, to have an order drawn up in pursuance of such

minute or not. If the party summoned considers that the order pronounced is in *his* favour, he should take out a cross-summons to obtain a similar order.—*Macdougall v. Nicholls*, 5 N. & M. 366.

5. (*Delivery of particulars.*) Under the rule of T. T. 1 Will. 4, requiring the delivery of a particular of the sum or balance claimed, the plaintiff is not bound to specify the sums received by him on account; it is sufficient that he state the balance remaining due. But if the plaintiff has not complied with the rule, the Court will not require him to pay costs for the violation of it, where the question of costs has been referred to and decided by an arbitrator.—*Smith v. Eldridge*, 5 N. & M. 408.
6. (*Opening rule.*) Mistakes in the terms of rules may be amended on motion to open them made within the same term, or perhaps that following; but where more time has elapsed, the affidavits which were used on the occasion of making the first rule absolute, cannot be referred to in order to open it, unless the new motion is made, and the new rule drawn up, on reading them.—*Lord v. Hope*, 5 Tyr. 487.
7. (*Time to plead.*) The Court will not grant an *indefinite* time to plead, on the ground that the defendant cannot safely plead until a rule pending in another court, and involving the same matter of defence, has been disposed of; but they granted time to plead, fixing a certain day.—*Clarke v. Allbutt*, 1 Tyr. & G. 71.
8. (*Judgment as in case of a nonsuit.*) To enable a defendant to use the issue, on supporting a rule for judgment as in case of a nonsuit, the affidavit must refer to it, and the rule must be drawn up on reading it.—*Meredith v. Stocker*, 1 Tyr. & G. 76; 4 D. P. C. 499.
- 7.* (*Setting aside regular judgment.*) The rule, that an application to set aside a judgment by default on affidavit of merits must be made within a reasonable time, applies as well to a prisoner as to other persons. (2 D. P. C. 350.)—*Fife v. Bruere*, 4 D. P. C. 329.
- 8.* (*Attachment.*) In C. P. two motions are necessary to make a judge's order a rule of Court, and for an attachment for disobedience thereto.—*Pilcher v. Woods*, 4 D. P. C. 329. (*Secus* in Exchequer; *Forster v. Kirkwall*, ib. 370.)
9. (*Rescinding judge's order.*) In order to rescind a judge's order, the proper course is to apply to the Court; therefore, where a writ of detainer issued under a judge's order, and was lodged at the prison on the 22d of October, and on the 30th a summons was taken out at chambers, returnable on the following day, to discharge the defendant out of custody on the ground of a defect in the affidavit to hold to bail, which was dismissed; it was held not too late to apply to the Court on the first day of Michaelmas term, to rescind the judge's order and discharge the defendant out of custody, on account of the insufficiency of the affidavit and the irregularity of the writ.—*Johnson v. Kennedy*, 4 D. P. C. 345.
10. (*Judgment as in case of nonsuit—Costs of the day.*) In order to ground an application for costs of the day, on a rule for judgment as in case of a nonsuit being discharged on a peremptory undertaking, it is necessary that

it should appear by affidavit that costs have been incurred.—*Ray v. Sharp*, 4 D. P. C. 354.

11. (*Staying proceedings.*) The Court will not grant a rule for staying proceedings on the last day of term.—*Doc d. Smith v. Hardy*, 4 D. P. C. 356.
12. (*Judgment for want of plea—Rule to plead.*) A judgment signed (after a defective plea delivered) as for want of a plea, is irregular, unless a rule to plead has been given.

A rule to plead in a wrong name is a nullity.—*Warne v. Beresford*, 4 D. P. C. 361.

13. (*Notice of declaration, when to be served.*) A notice of declaration being filed, served in the country, at 150 miles distance, on the day the declaration is stated to be filed, is regular.

A motion to set aside a judgment as irregular for being signed too early, viz. on the 18th, notice of declaration not having been given until the 5th, was held to be answered by an affidavit that the notice was served on the 4th, although it was not shown whether the notice was served on that day before or after declaration filed.—*Rooke v. Sherwood*, 4 D. P. C. 363.

14. (*Authority of judge at chambers, time for objecting to.*) After an order of a judge at chambers has been made a rule of Court, it is too late to object, in answer to a rule calling on the party to pay money in pursuance of such order, that the judge had no power to make it.—*Wilson v. Northop*, 4 D. P. C. 441.

15. (*Motion for new trial.*) Where a motion for a new trial is by accident delayed beyond the four days, notice ought to be given to the other side, otherwise the expense of intermediate proceedings will fall on the party who so delays to move.—*Lester v. Lazarus*, 4 D. P. C. 445.

16. (*Inspection of documents.*) Certain books of the plaintiff had come into the defendant's possession as his agent. It became necessary for the plaintiff to inspect them. The Court ordered the defendant to allow an inspection, but would not order him to deliver them up.—*Jones v. Palmer*, 4 D. P. C. 446.

17. (*Judgment as in case of a nonsuit.*) Though a rule absolute for judgment as in case of a nonsuit have been obtained for not proceeding to trial pursuant to a peremptory undertaking, yet if it appear that through mistake only notice of trial was not given in due time, and that no inconvenience has been sustained by the defendant in consequence, the Court will discharge the rule on payment of costs, and enlarge the peremptory undertaking.—*Charrington v. Meatheringham*, 4 D. P. C. 479.

18. (*Right to begin.*) In debt for a penalty of 50*l.* for carrying the plaintiff to a prison under mesne process within twenty-four hours, the defendant pleaded that it was by the plaintiff's own consent, which the replication denied: Held, that as the plaintiff did not go for unliquidated damages, on these pleadings the defendant ought to begin.—*Silk v. Humphrey*, 7 C. & P. 14.

19. (*Same.*) In an action by indorsee against acceptor of a bill of exchange, the defendant pleaded that it was an accommodation bill, and that a blank

acceptance had been filled up and applied in discharge of this and other bills. The plaintiff replied, that the defendant broke his promise without such cause as in the plea alleged: Held, that on these pleadings the defendant was entitled to begin.—*Faith v. McIntyre*, 7 C. & P. 44.

20. (*Same.*) Assumpsit. Plea, as to 20*l.*, payment; as to the residue a set-off: Held, that the defendant must begin.—*Corhead v. Huish*, 7 C. & P. 63.
21. (*Amendment of venire.*) A judge sitting at *nisi prius* has no authority to direct an amendment of the award of the *venire facias* on the *nisi prius* record.—*Adams v. Power*, 7 C. & P. 76.
22. (*Right to begin—Production of bill of exchange at trial.*) Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the bill had been altered after acceptance: Held, that the defendant was entitled to begin, and that on his calling for the bill, the plaintiff was bound to produce it without notice.—*Barker v. Malcolm*, 7 C. & P. 101.
23. (*Right to begin.*) If, in an action of covenant for non-repair, &c. the defendant pleads affirmative pleas, which are denied by the replication, the defendant is entitled to begin.

The new rule of practice made by the judges as to the right to begin, does not extend to actions of contract.—*Lewis v. Wells*, 7 C. & P. 221.

PRESCRIPTION.

- (*Plea of lost grant, how supported.*) Enjoyment of a *profit-a-prender* by the owners and occupiers of a particular estate, during living memory, without any evidence of user or non-user at any antecedent period, is evidence of a prescriptive right, but will not support a plea of a *lost grant*. To support such plea, some evidence must be given tending to refer the commencement of the user to the period of the supposed grant. (3 Bing. 115.)—*Blewett v. Tregonning*, 5 N. & M. 308.

And see CUSTOM.

PRISONER.

1. (*Discharge of small debtor.*) Where a defendant is in custody in any other prison than the Fleet, he cannot be discharged (in the Exchequer) under the 48 Geo. 3, c. 123, unless a copy of the causes in which the defendant is in custody has been procured, and verified by the proper officer.—Such a motion cannot be made at chambers.—*Short v. Williams*, 4 D. P. C. 357.
2. (*Same.*) In an application under the 48 Geo. 3, c. 123, s. 1, the Court require only to be satisfied that the defendant has lain in prison twelve months for a debt under 20*l.*, and will not inquire into any other circumstances.—*Baxter v. Clarke*, 2 C., M. & R. 734; 1 Tyr. & G. 133.

PROCESS.

1. (*Distringas.*) To entitle a plaintiff to a *distringas* on a writ of summons not personally served, the copy of the writ must be left at the *third* call.—*Mason v. Lee*, 5 N. & M. 240.
2. (*Description of defendant's residence in writ.*) The Uniformity of Process

Act requires that the place and county of the defendant's actual or supposed residence shall be correctly stated; but the Court will not set aside a writ of summons, unless the defendant produces a positive affidavit that the residence has been misdescribed.—*Lewis v. Newton*, 2 C., M. & R. 732; 1 Tyr. & G. 72; 4 D. P. C. 355.

3. (*Second writ on same affidavit.*) An affidavit of debt was filed, April 9th, with the filacer for Surrey; on the 7th of May a *capias*, and in November an *alias capias* thereon, issued into Middlesex, no fresh affidavit being filed, the filacer for Surrey and Middlesex being the same person: Held regular.

A *stale* affidavit means one sworn above a year ago. (1 C. & M. 70; 10 Bing. 322, 441.)—*Ramsden v. Maugham*, 2 C., M. & R. 634; 1 Tyr. & G. 40; 4 D. P. C. 403.—And see *Rock v. Johnson*, 2 C., M. & R. 635, n.; 1 Tyr. & G. 43; 4 D. P. C. 405.

4. (*Distringas—Entering appearance.*) Where a *distringas* has gone, and the sheriff returns that he has levied 40s., no rule is necessary previously to entering a common appearance. (4 D. P. C. 203.)—*Tucker v. Brand*, 4 D. P. C. 411.

5. (*Setting aside defective writ.*) Where, in the copy of a writ of summons served, the words "on promises," were omitted, this was held a ground only for setting aside the *copy*, not the writ itself.

The entry of an appearance by the plaintiff for the defendant does not operate as a waiver of an objection to the copy of the writ.—*Chalkley v. Carter*, 4 D. P. C. 480.

PROHIBITION.

1. (*Several pleas in.*) Since the statute 1 Will. 4, c. 21, several pleas may be pleaded to a declaration in prohibition, the king being no longer a party to the suit.—*Hall v. Maule*, 5 N. & M. 455.
2. The same point which was decided in *Ex parte Smyth*, 5 N. & M. 145; as to a prohibition to an Ecclesiastical Court, was ruled also in the Court of Exchequer.—*Ex parte Smyth*, 2 C., M. & R. 748.

QUO WARRANTO.

(*In respect of what office it lies.*) By a local act, the inhabitants of an incorporated district were directed to elect governors and directors of the poor. Those officers were authorized to make orders and regulations respecting the poor and the poor rates; to make out a list of occupiers from which the justices in petty sessions were to elect overseers; to appoint watchmen and beadles, (who were to be sworn in and act as constables, and to be under the direction and control of the governors and directors,) clerks, collectors, treasurers, inspectors, assistant overseers, and all such other officers as they might think fit; to dismiss them, and pay them such salaries as they might think proper; to ascertain and settle the sum to be assessed for parochial purposes; to have vested in them all houses, &c. used for the accommodation of the poor and of the watchmen and beadles, and all other property purchased for such purposes; and were to sue and be sued, and to prosecute by indictment or information: Held,

that the office of governor and director was not such an office as that an information in the nature of a *quo warranto* would lie in respect of it.—

Rex v. Ramsden, 5 N. & M. 325.

RAPE.

(*Indictment—Principal and accessory.*) A count charging A. with a rape as principal in the first degree, and B. as principal in the second degree, may be joined with another count charging B. as principal in the first degree, and A. as principal in the second degree.—*Rex v. Gray*, 7 C. & P. 164.

REPLEVIN.—See MORTGAGOR AND MORTGAGEE.

RESCOUS.

If a hayward take cattle which are straying in a common or lane, and they are rescued as he is taking them to the pound, this rescue is indictable: but if the hayward take cattle which are damage feasant in the inclosed land of any private occupier, the rescue of them before they get to the pound is not indictable; in the latter case, till the cattle get to the pound, the hayward is to be considered the mere servant of the occupier.—*Rex v. Bradshaw*, 7 C. & P. 233.

SETTLEMENT.

1. (*By birth, how rebutted.*) A *prima facie* case of settlement by evidence of the place of birth of the pauper, may be answered by proof of the maiden settlement of his mother, without showing that his father had no settlement. (Burr. S. C. 485; 13 East, 311; 1 B. & Ad. 201.)—*The King v. Inhabitants of St. Mary, Leicester*, 5 N. & M. 215.
2. (*By apprenticeship—Stamp.*) The proviso in 37 G. 3, c. 111, exempting from the stamp duties thereby imposed every indenture of apprenticeship “where a sum or value not exceeding 10*l.* shall be given or contracted with or in relation to the apprentice,” does not extend to an indenture where no consideration passes.—*The King v. Inhabitants of Mabe*, 5 N. & M. 241.
3. (*By renting tenement—Removal—Residence.*) Where a party rents and occupies for a year a tenement in parish A., at the yearly rent of 10*l.*, and, before the full rent has been paid, is removed to B. by an order, which is unappealed against or confirmed on appeal, but afterwards pays the remainder of the rent, he acquires a settlement in A. under the stats. 6 G. 4, c. 57, and 1 W. 4, c. 18. (2 T. R. 709; 8 B. & C. 99; 2 B. & C. 847.)

The forty days' residence required under this head of settlement must be within the year of occupation, but it is immaterial at what period of the year it takes place.—*The King v. Inhabitants of Willoughby*, 5 N. & M. 457.

4. (*By renting tenement—How far finding of sessions conclusive.*) In order to constitute a “coming to settle” within the 13 & 14 Car. 2, c. 12, the party must have come into the parish *animo morandi* or *residendi*; but it is not necessary that he should have come with an intention to reside permanently.

Per Patteson and Williams, Js. (Coleridge, J. dissenting), the residence intended need not be for such a time and under such circumstances as would, at the time of the passing of the 13 & 14 Car. 2, c. 12, have conferred a settlement.

But whether a party came to settle within the meaning of the statute, is a question of fact to be decided by the sessions alone; and if they find in the negative, the Court of King's Bench will not interfere with their finding, unless, on the facts stated, they see that the finding is necessarily wrong.

The sessions found that A. hired and paid for lodgings for the pauper in W., that the pauper came to W., and resided in the lodgings for a week, then married, and continued to reside in the lodgings until his removal under the order appealed against: Held, by Patteson and Williams, Js. (Coleridge, J. dissenting,) that a finding by the sessions that the pauper did not come to settle in W. within the meaning of the 13 & 14 Car. 2, c. 12, was repugnant to the facts found, and necessarily wrong. (2 B. & Ad. 625; 14 East, 251; 10 East, 25; 4 B. & C. 230.)—*The King v. Inhabitants of Woolpit*, 5 N. & M. 526.)

5. (*Imperfect contract of apprenticeship.*) It is a question of fact for the sessions to determine, whether an agreement to serve was a contract of hiring or of apprenticeship: and the Court will not disturb their finding, unless it appear to have been altogether repugnant to the facts. The true test is, what was the apparent object of the parties to the contract: if it was for the one party to teach and the other to learn, the agreement is a contract of apprenticeship: but it is not therefore necessary that the precise words to *teach* or to *learn* should occur in the agreement, in order to make it such.—*The King v. Inhabitants of Great Wishford*, 5 N. & M. 540.

SHERIFF.

1. (*Return of fi. fa. where defendant has become bankrupt.*) Where a defendant, against whom a *fi. fa.* had issued, became a bankrupt after the seizure, and his assignees made an arrangement with the sheriff as to the disposal of the goods: Held, that the sheriff could not be ruled to return the writ on behalf of the bankrupt.—*Gilbert v. Whalley*, 2 C., M. & R. 722.
2. (*Attachment for insufficient return.*) In discussing a rule *nisi* for an attachment against a sheriff for an insufficient return to a writ, the Court will not take cognizance of the return, unless an office copy be produced verified by affidavit, although there be an affidavit by a party of his belief that no sufficient return has been made. (3 D. P. C. 349.)—*Wilton v. Chambers*, 5 N. & M. 430.

And see BAIL, 6; INTERPLEADER ACT.

SLANDER.

- (*Privileged communication.*) The defendant, having some cause of suspicion against the plaintiff, made a charge of theft against him to his relations: but it appeared that his object in making the communication was rather

to compromise the felony than to promote inquiry, or to enable the relatives to redeem the plaintiff's character: Held, that this was not a privileged communication; that malice was necessarily implied, and that the existence of it was not a fact to be left for the consideration of the jury.—*Hooper v. Truscott*, 2 Bing. N. C. 457.

STAMP.

1. A., an architect, employed to superintend the erection of some buildings on commission, assigned to B., his creditor, all the commission to which he then was or thereafter might be entitled in respect of such superintendence, on trust to pay C. a certain debt due from A., and to retain the residue towards satisfaction of a debt due from A. to B.: and in such deed was contained a power of attorney to receive the commission, and covenants from A. that he would pay the debt due to B., and would not receive the commission or revoke the power thereby given, or do any act by which B. might be hindered in receiving the commission: also that A. had a right to assign, that he had not encumbered, and for further assurance: Held, that this deed was not a mortgage, but an absolute conveyance of the commission money; and that a conveyance stamp, calculated on the amount of commission eventually received, was sufficient.—*Pooley v. Goodwin*, 5 N. & M. 466.
2. (*What is a contract for the sale of goods.*) The plaintiff contracted to make for the defendants a copper plate press, to be ready in three months, the defendants to pay part of the price by instalments, up to the delivery of the press, the remainder in six months: Held, that this was a contract relating to the sale of goods, within the exception in the Stamp Act. (3 M. & Sel. 178; 6 Taunt. 11; 5 B. & Ald. 613; 2 Car. & P. 159. *Buxton v. Bedall*, 3 East, 303, is to be considered as overruled by the latter cases).—*Pinner v. Arnold*, 2 C., M. & R. 613; 1 Tyr. & G. 1.
3. (*Agreement.*) A receipt for rent, with a memorandum that it shall not operate as a waiver of a previous notice to quit, does not require an agreement stamp.—*Doe d. Wheble v. Fuller*, 1 Tyr. & G. 17.

And see BILL OF EXCHANGE, 4; INTERPLEADER ACT, 1; SETTLEMENT, 2.

TITHES.

- (*By what words of conveyance they pass.*) A. having in 1815 purchased the tithe of land of which he was seised in fee, in 1816, by a settlement on the marriage of his son, conveyed the land to trustees for his son's wife, "together with all profits, commodities, advantages, emoluments, hereditaments, and appurtenants, to the premises belonging or in any wise appertaining, and the reversion, &c., and all the estate, right, title, interest, use, trust, possession, freehold, inheritance, reversion, claim, and demand whatsoever of him A. therein or thereto:" Held, that the tithes did not pass by this conveyance. (Shep. Touch. 78; 11 Rep. 13; 1 Leon. 281; Cro. Eliz. 101; 3 Bos. & P. 362; 8 Price, 39, 44, 70; 3 Bligh, 261).—*Chapman v. Gatcombe*, 2 Bing. N. C. 516.

TRESPASS. See COSTS, 1, 2, 3, 13.

TROVER.

1. (*Conversion*.) The widow and administratrix of an insolvent, being applied to by his assignees for some papers which had been in his possession at the time of her death, answered that they were in the hands of her attorney: Held, no conversion.—*Const v. Hughes*, 2 Bing. N. C. 448.
2. (*Conversion—Foreign attachment*.) In trover for a chaise, it appeared that one B. had hired the chaise in question from the plaintiff, and had placed it at livery with the defendant, in the city of London, in whose possession it was attached by process out of the Sheriff's Court, in an action against B. The plaintiff demanded the chaise, but the defendant, alleging that it had been attached, refused to deliver it: Held, that there was no evidence of a conversion by the defendant, the chaise being at the time of the demand in the custody of the law, and not of the defendant.—*Verral v. Robinson*, 2 C., M. & R. 495.
3. (*For chattel in possession of bailee—Pleadings*.) In the case of the simple bailment of a chattel, without reward, it may be recovered in trover either by the bailor or bailee, if taken wrongfully out of the bailee's possession. (2 Roll. Abr. 569, pl. 22; 7 T. R. 12; 2 Taunt. 268; Ry. & M. 99.)

Trover for horses, cows, furniture, &c. &c. Plea, that J. H. was possessed of the cattle, goods, and chattels in the declaration mentioned, and fraudulently sold them to the plaintiff, to avoid an execution against the goods of J. H., and that the defendant (the sheriff) seized them under such execution. Replication, that J. H. did not fraudulently sell the cattle, goods, and chattels in the declaration mentioned to the plaintiff and issue thereon. The particular of demand was merely "one cow." It appeared that the plaintiff had lent a cow to J. H., that the goods of J. H. were fraudulently sold to avoid an execution, and the greater part of them bought by the plaintiff; that the plaintiff's cow was not sold, nor was any cow sold at such sale:—Held, that the plaintiff was entitled to a verdict on the above issue.

The plea of no property in the plaintiff, in trover, means no property *as against the defendant*.—*Nicolls v. Bastard*, 2 C., M. & R. 659; 1 Tyr. & G. 156.

UNIVERSITY OF OXFORD.

(*Jurisdiction of Court of Chancellor of*.) A member of the University of Oxford cannot be arrested by civil process out of the Court of the Chancellor of the University, unless such process issue in a suit commenced against him while resident within the precincts of the University. And that must appear distinctly, and not merely by inference, on the return to a *habeas corpus cum causa* to remove the defendant into K. B., otherwise he will be discharged. (2 Wils. 310.)—*Perrin v. West*, 5 N. & M. 291.

VESTRY ACT.

(*Trustees for building churches, compellable to produce their accounts under*.) The trustees appointed and acting under a local act of parliament for building a church, which authorizes them to levy rates on the inhabitants

of the parish, and directs that the accounts shall be audited and allowed by the Quarter Sessions, are nevertheless compellable; under the General Vestry Act, 1 & 2 Will. 4, c. 60, s. 34, to produce and explain their accounts before the auditors of the parish accounts, appointed under and in consequence of the adoption of that act.—Such auditors can hold their meetings *only* in the board-room of the vestry.—*The King v. Trustees of St. Pancras New Church*, 5 N. & M. 219.

WARRANTY.

(*Of horse—Unsoundness.*) *Bone spavin* in the hock is unsoundness in a horse, whether it produces lameness apparent at the time of the warranty or not, and even though it may not produce lameness for years after.—*Watson v. Denton*, 7 C. & P. 85.

WELCH JUDGMENT.

In *scire facias* on a judgment recovered in a Court of Great Sessions in Wales, the production of the certificate of the prothonotary of such court, with the transcript of the record annexed, pursuant to the 1 Will. 4, c. 70, s. 27, is sufficient proof of the allegation of judgment recovered, “as by the record, duly transferred and remaining in the Court of Exchequer at Westminster, manifestly appears.”

A suit in which judgment was obtained in the Court of Great Session, but in which there has been no execution issued, is a suit *depending* in that court, within the meaning of the 1 Will. 4, c. 70, s. 14, and was transferred to the Court of Exchequer by the authority of that act.

To such *scire facias* the defendant pleaded, that judgment was recovered in the Court of Great Session by default, in debt on a *concessit solvere*, and that, by the practice of that Court, execution could not issue in such case without an affidavit previously made by the plaintiff, verifying the amount of the debt; and that no such affidavit was made by the plaintiff: Held, on special demurrer, that the plea was bad, as pleading a mere matter of practice, and *that* a practice which was abolished.—*Howell v. Bowers*, 2 C., M. & R. 621; 1 Tyr. & G. 88; 4 D. P. C. 386.

WITNESS.

1. (*Commission for examination of witnesses abroad.*)—Under the 1 Will. 4, c. 22, s. 4, the Court may order a commission to issue for the examination of witnesses abroad, omitting the usual clause requiring the commissioners to take an oath as such, where it is shown that such omission is requisite for the purpose of making the commission effectual. Where, therefore, it appeared that witnesses residing at Hamburgh, whose evidence was necessary in a cause, refused to give evidence voluntarily before ordinary commissioners, and by the law of Hamburgh could not in any manner be compelled to do so; but that the judges of the Court of Commerce there would have power to compel the attendance and examination of the witnesses on oath under a commission directed to them by the Court here, and would be willing to render it effectual, provided they were not called upon to take any special oath as commissioners, the Court ordered a commission to issue to them, omitting the clause requiring the usual oath.

And the Court refused to make any special order as to the costs of such commission, leaving them to be costs in the cause.—*Clay v. Stephenson*, 5 N. & M. 318.

2. (*Competency of, on indictment for perjury.*) On an indictment for perjury committed by A. on the trial of an action against B. and others, B. is not rendered incompetent as a witness for the prosecution merely on the ground that he has not paid the debt and costs, and has filed a bill in equity; but it seems, that if B. expects that A. will be a witness against him in a similar action coming on for trial soon after the indictment, that is such an immediate interest as will disqualify B. from becoming a witness. (1 Esp. 97; Peake, N. P. C. 12.)—*Rex v. Hulme*, 7 C. & P. 8.
2. (*Competency.*) In an action by A. against B. for use and occupation, C., who was called as a witness for the plaintiff, stated that A. had let the premises to him, C., and that his tenancy was still undetermined. It was proposed on the part of the plaintiff to ask C. whether he had not let the defendant into possession: Held, that this could not be asked unless C. were released by A.; and that the stat. 3 & 4 W. 4, c. 42, ss. 26, 27, did not apply in this case.—*Hodson v. Marshall*, 7 C. & P. 16.
4. (*Competency—Drawer of bill.*) In an action by indorsee against acceptor of a bill of exchange, alleged to be an accommodation bill, the drawer was called as a witness for the defendant. Parke, B., allowed him to be examined, under the statute 3 & 4 W. 4, c. 42, s. 27, his name having been indorsed on the *postea* under the provisions of that statute. (1 M. & R. 315.)—*Faith v. McIntire*, 7 C. & P. 44.

WRIT OF ERROR. See JUDGMENT.

WRIT OF RIGHT.

1. The demandant sued out a writ of right, December 28, 1834, returnable in January 1835. He altered the return and resealed the writ every term till November 1835, when it was served on the tenant. The Court set aside the service.—*Leigh v. Leigh*, 2 Bing. N. C. 464.
2. On a motion to set aside a writ of right, on the ground that it had been resealed after service of a summons, the writ not having been returned, the Court of C. P. refused to interfere, as having no jurisdiction. (3 Bl. Com. 273; Com. Dig. Droit, C. 2.)—*Foot v. Sheriff*, 2 Bing. N. C. 528.

WRIT OF TRIAL ACT.

1. (*Notice of trial—Delivery of issue.*) That a notice of trial before the sheriff if given for a day not fixed for trying causes, is no ground for moving to set it aside.

In causes to be tried before the sheriff, the issue must be delivered as in other cases.—*Arden v. Garry*, 2 Scott, 188.

2. *Semble*, that when an application has been made to a judge at chambers for a writ of trial, and he has refused to make the order, the Court will not entertain the application, although the party might, under the act, have come before the Court in the first instance.—*Davies v. Lloyd*, 1 Tyr. & G. 28; 4 D. P. C. 478.

3. Where the defendant obtains an order to try before the sheriff, the judge has no authority to impose terms on the plaintiff, as to the time of trying, without his consent. (1 C., M. & R. 519; 3 Dowl. P. C. 650, 658.)—*Wright v. Skinner*, 2 C., M. & R. 746; 1 Tyr. & G. 69.
4. On an application for a new trial, in a case tried before the sheriff, the affidavits need not state the pleadings; for the writ of trial is presumed to be in Court.—*Milligan v. Thomas*, 2 C., M. & R. 756; 1 Tyr. & G. 134; 4 D. P. C. 373.

EQUITY.

[Containing 8 Bligh, Part 3; 3 Mylne & Keen, Part 1; and 6 Simons, Part 3.]

AGENT.

(*Gift to.*) A gift by deed, subject to a power of appointment by the donor, from a person upwards of ninety years of age, to a confidential agent, who had for many years been in habits of friendship with the donor, without the intervention of a disinterested third person, the solicitor who drew the deed being the solicitor of the person who took the benefit under it: Held, under all the circumstances, valid. (See *Harris v. Tremenhare*, 15 Ves. 40.)—*Hunter v. Atkins*, M. & K. 139.

BANKRUPT.

A., on behalf of the owner of a ship, entered into a charterparty with B., by which B. agreed to pay to A. a certain sum for the freight of the ship, by two instalments, one instalment to be paid on the sailing, and the other on the completion of the voyage. The owner, being indebted to C., ordered in writing A. to pay to C. all monies he might receive under the charterparty; and accordingly A. paid over the first instalment to C. The owner then assigned, by deed, the remainder of the freight to C., who gave notice of the assignment to A., but not to B. The vessel completed the voyage, and afterwards the owner became bankrupt. Held, that the notice to A. was sufficient to put the freight out of the order and disposition of the owner.—*Gardner v. Scott*, Sim. 407.

CHARITY.

1. (*Lease.*) In 1710, lands in Ireland, which had been recently, and before they became vested in the trustees of a charity, let for 100*l.*, supposed to be a fair rent, were leased by the trustees at the same rent, for three lives, on payment of 100*l.* premium, with a covenant for perpetual renewal. In 1782 the lease was renewed, on payment of a fine. Held, that the lessee ought not to be disturbed. (See *Attorney-General v. Warren*, 2 Swans. 291.)—*Attorney-General v. Hungerford*, Bl. 437.
2. (*Surplus—Length of time.*) On the prayer of A. N., a free grammar school was founded at M. by letters-patent of Queen Elizabeth, which provided the principal, &c. of B. N. College should be governors, and that there should be of her own foundation six scholarships, to be filled from M. school, to be nominated by A. N. while living, and afterwards by B. N. C. and their successors, with license to A. N. to erect seven new scholarships for scholars from M. school, if so many fit scholars

should be found therein, but if not, from certain other schools; with power to A. N. to fix the stipends to be paid to the scholars; and to him and the scholars successively to make statutes for the governance of the masters of the school and the scholars in the college, and their stipends, and for the disposition of the revenues for the support of the school and scholars. The letters-patent then set forth the gift of rents to the College as governors of the school, "ad proprium opus et usum eorundem principalis et scholarium ejusdem Aulæ Regiæ et Collegii de Brazen Nose in Oxon' Gubernatorum liberæ scholæ predictæ, &c. Eâ tamen intentione quod ex præmissis per præsentis præconcessis et ex aliis terris, &c. imposterum ad usum liberæ scholæ predictæ, &c. dandis, &c. iidem, &c. gubernatores," &c., should pay annually 20 marks by way of stipend to the then master and his successors, and 10 marks to the then under-master and his successors, &c. Afterwards, Queen Elizabeth, by letters-patent, granted to B. N. C., as governors of the school, the manor of M. in mortmain, and she willed that the principal and each fellow should take an oath that they would pay over the rents as follows; namely, yearly to each of her thirteen poor scholars, elected out of her free school at M., for their support, 3*l.* 8*s.* 6*d.*, and 6*s.* 8*d.* weekly for the improvement of the commons of the college. The funds for the support of the school were provided chiefly by A. N., and they exceeded the amount of the provision made by the letters-patent for the masters and scholars of the school. A. N. in his lifetime had permitted the surplus of the revenues, beyond what was applied for the use of the school, to be appropriated to the use of the college. In 1712 the thirteen scholarships were consolidated into one; the school decayed; no scholar was elected for many years; and the greater portion of the revenues of the charity, then much increased, had been applied to the use of the college. Held, that, under all these circumstances, the application of the funds should not be disturbed. (*Thetford case*, *Coke's Rep.*; *Attorney-General v. Mayor of Bristol*, 7 Bro. P. C. 235.)—*Attorney-General v. Brazen Nose College*, Bl. 377.

COSTS.

The insufficiency of the fund to pay the debts is the only case in which the plaintiff in a creditor's suit is entitled to his costs, as between solicitor and client. (See *Tootal v. Spicer*, 4 Sim. 510.)—*Brodie v. Bolton*, M. & K. 168.

DEBTOR AND CREDITOR.

An injunction will be granted to restrain the goods of a partnership from being taken in execution for a debt due from one of the partners, who dies before the writ is delivered to the sheriff. (See 29 Car. 2, c. 3, s. 16.)—*Newell v. Townsend*, Sim. 419.

EXECUTOR.

1. Executors are not allowed to charge for the employment of an agent, except under very special circumstances.—*Weiss v. Dell*, M. & K. 26.

2. An exception to the Master's report, by which he had reduced an executor's charge for the employment of an agent at 5 per cent. to 2½ per cent., was overruled.—*S. C.*

EXECUTORS AND ADMINISTRATORS.

A trust in a marriage settlement, to raise a sum of money charged on the settled estate, at the end of twelve months from the decease of the survivor of the husband and wife, and to pay the same to the executors or administrators of the wife: Held, under the circumstances, a trust for the next of kin of the wife, who died in the husband's lifetime.—*Bulner v. Jay*, M. & K. 197.

INFANT.

Where an infant has an allowance made to him by his guardians for his support, a tradesman is not entitled to be paid for articles supplied to the infant on credit; unless he can make out that, having regard to the infant's circumstances and station (which he is bound to inquire into), the articles were necessities.—*Mortara v. Hall*, Sim. 465.

INJUNCTION.

1. (*Contingency.*) An injunction to restrain the defendants from suing in Ireland upon a bill of exchange, given by the plaintiff for a gambling debt, was, under the circumstances, continued. (*Wharton v. May*, 5 Ves. 71.)—*Lord Portarlington v. Soulby*, M. & K. 104.
2. (*Agreement.*) The proprietors of Covent Garden Theatre agreed with an actor that he should act for twenty-four nights, during a certain period of time, at their theatre, and that in the meantime he should not act at any other place in London: Held, that the agreement to act at Covent Garden could not be enforced, and an injunction to restrain the acting elsewhere was refused. (*Morris v. Colman*, 18 Ves. 437.)—*Kemble v. Kean*, Sim. 333.
3. (*Same.*) Where a party agrees not to do a particular act, and there are other terms in the agreement which are so vague that the Court cannot enforce them, it will not interfere on the first point.—*Kimberley v. Jennings*, Sim. 340.
4. (*Apprehended mischief.*) An injunction, at the instance of commissioners for cleansing and improving the river Witham and its navigation, and the drainage of the adjacent lands, against the erection or use of a steam-engine, by trustees for draining a particular district, on the ground of probable damage to the banks of the river, and of apprehended injury to the drainage of the lands within the jurisdiction of the commissioners, was refused.—*Earl of Ripon v. Hobart*, M. & K. 169.

INSOLVENT.

In a foreclosure suit against an insolvent mortgagor and the provisional assignee of the Insolvent Court, who claims no interest, the plaintiff must pay the costs of the assignee, and add them to his debt. (*Woodward v. Haddon*, 4 Sim. 606.)—*Weaving v. Count*, Sim. 439.

JURISDICTION.

On a bill in equity in England, by creditors, it was decreed that the trusts of a deed, by which lands in Ireland were vested in trustees for the payment of debts, should be executed, the debtor did not appear to the original bill, but he put in an answer to a supplemental bill, and by cross bill impeached the debts as fraudulent, and he opposed the proceedings in various stages of the latter suit. A bill was then filed in the Court of Chancery in Ireland, to carry the former decree into execution. Held, that the Court in Ireland had jurisdiction, and that the decree here might be questioned in Ireland, and sustained in part only. (*Kennedy v. Cassilis*, 2 Swans. 325; *Pennin v. Lord Baltimore*, 1 Ves. sen. 444; *White v. Parther*, 1 Knapp, 189; *Harrison v. Gurney*, 2 J. & W. 563.)—*Houlditch v. Donegal*, Bl. 301.

LEGACY.

1. (*Substitutional*.) A testatrix gave the sum of 100*l.* to A., to be paid immediately after the decease of her husband, and in default of issue of their marriage; and in a subsequent part of her will she gave 100*l.* to A.; and concluded her will by directing that legacies, to which no time of payment was affixed, should be paid within three months after the death of her husband: Held, that A. took only one legacy of 100*l.* (See *Duke of St. Albans v. Beauclerk*, 2 Atk. 636)—*Manning v. Thesiger*, M. & K. 29.
2. (*Charge*.) T. R. devised his estates, charged with debts and legacies. The devisee mortgaged the estate to A., subject expressly to the legacies. A. having called in his money, and the devisee requiring a further advance, they join in mortgaging the estate to B., but not expressly subject to the legacies, and B. is informed, falsely, by the devisee, that all the legacies had been paid. Held, that B. took the same estate that A. had, and therefore subject to the legacies. (See *Watkins v. Cheek*, 2 S. & St. 199.)—*Rogers v. Rogers*, Sim. 364.
3. (*Duty*.) An instrument, vesting property in trustees for the benefit of the grantor for his life, and after his decease for the benefit of other persons, with a power of revocation, is not testamentary, and, consequently, not liable to the payment of legacy duty. (See *Attorney-General v. Jones*, 3 Price, 368.)—*Thompson v. Browne*, M. & K. 32.

MARRIAGE.

(*Consent of trustee*.) G., by his will, directed his trustees to pay to his daughters their portions on marrying with the consent in writing of his trustees first had and obtained; and on their marrying without such consent, that the trustees should stand possessed of their fortunes in trust for their separate use for life, with remainder to their children. A. proposed to the trustees to marry one of the daughters, who was an infant. The terms, as communicated to her by one of the trustees, were, that 500*l.* should be paid to A., on his marriage, out of her portion, and that the remainder should be invested, in the names of trustees, for her sole use and benefit, the interest to be paid to her only. The daughter

accepted the proposals, and asked the consent of the trustees. The same trustee then wrote to her, saying that he and his co-trustee had not then signed the consent, but were ready to do so as soon as requisite; and a draft was prepared by which (subject to the payment of the 500*l.* to the husband) the portion was settled on the intended husband during his solvency, then on the intended wife, for her separate use for life, with remainder to the children, with remainder to the survivor of the intended husband and wife. A. having made certain arrangements for the disposal of the 500*l.* which the trustees disapproved of, the trustee who had written refused to look at the draft of the settlement, saying he should expect A. to make some other proposals respecting the disposal of the 500*l.* Another arrangement was accordingly made, and communicated to the trustee; but he took no notice of it, and his name was struck out of the settlement; and the marriage (to which his co-trustee had duly consented) was had, without further communication with him. Held, that there had been a sufficient consent to the marriage.—*Le Jeune v. Budd*, Sim. 441.

MORTGAGE.

1. (*Redemption—Time.*) B. P. and J. E. being seised in fee, in right of their wives, of two undivided fourth parts of an estate, subject to a mortgage term, joined, in 1784, with the owner of the other two fourths, in conveying the estate, by lease and release, but without a fine, to a purchaser in fee, and the mortgage was paid off, and the term assigned to attend. The purchaser, and those claiming under him, had been in possession from the date of the conveyance. B. P.'s wife survived him, and died in 1825, leaving one of the plaintiffs her heir. J. E.'s wife died in 1818, leaving the other plaintiff her heir. J. E. died in 1826. In 1830 the plaintiffs brought an ejectment, but were nonsuited by the defendants setting up the term. In 1831 they filed a bill to redeem, which was dismissed, on account of the length of possession by the defendants and those under whom they claimed. (*Cholmondeley v. Clinton*, 4 Bl. 1; *Price v. Copner*, 1 S. & St. 347.)—*Ashton v. Milne*, Sim. 369.
2. (*Rests.*) L. conveyed his estates to D. in trust, to sell, and pay off a mortgage and other incumbrances on the estates, and to retain a debt due to D., and until the sale, to apply the rents in keeping down the interest on the charges, and to pay the surplus to L. D. took a transfer of the mortgage, and entered into and remained in possession twenty-four years, but did not sell the estates. For the first ten years the rents were less than the interest, but afterwards they exceeded it. L. filed a bill for an account of the rents received by D., with yearly rests, and for a re-conveyance of the estates. Held, that the Court could not decree the account to be taken with rests. (*Davis v. May*, 19 Ves. 383.)—*Latter v. Dashwood*, Sim. 462.
3. (*Exoneration.*) J. H. having agreed to secure a marriage portion for his daughter, mortgaged part of his estates for that purpose, and covenanted

to pay the money. By his will, he directed his debts to be paid, first, out of the residue of his personal estate, then out of his money in the funds, and, lastly, out of his residuary real estates. Held, that the mortgaged estate was not exonerated. (See *Lanoy v. Duke of Atholl*, 2 Atk. 444.)—*Graves v. Hicks*, Sim. 400.

PARTNERSHIP.

1. (*Mail coach contract.*) By the terms of the articles of agreement usually entered into between the postmaster-general and the persons supplying horses for the mail coaches, the postmaster-general cannot exercise the power of nominating a new party to perform neglected duty, for which provision is made in the articles, without notice to all the parties to the agreement, who have the option of performing the neglected duty themselves.—*Lovegrove v. Nelson*, M. & K. 1.
2. (*Same—Waiver.*) A bill for an account by a substituted party, of whose nomination notice had been given to the defendant, an original contracting party, entitled to the option of performing the neglected duty himself, was nevertheless sustained, on the ground that the defendant knew of the nomination of the plaintiff, and that his conduct was equivalent to a waiver of the option.—*S. C.*
3. (*Pawnbrokers.*) An agreement for a secret partnership is a contravention of the laws made for regulating the business of a pawnbroker, and no legal partnership is thereby constituted. (39 & 40 Geo. 3, c. 99; *Armstrong v. Lewis*, 2 C. & M. 274.)—*Armstrong v. Armstrong*, M. & K. 45.

PLEADING.

1. (*Exceptions.*) When a Master, in a reference as to the priority of incumbrances, reports against the priority of a particular party, and states the facts upon which he had come to that conclusion, the regular course is to take an exception to the conclusion, and not to take exceptions to the particular facts, because the master's conclusion may be correct, though particular facts be mistaken.—*Hartley v. Hewitt*, M. & K. 28.
2. (*Demurrer.*) A. being in possession of an estate under a decree in 1783, B. filed a bill against him to recover the estate, and brought a writ of right for the same purpose. A. then filed a cross bill against B., seeking for a discovery of matters relating to B.'s pedigree, and praying that B. might elect whether he would proceed at law or in equity, and that, if he elected the latter, he might be perpetually restrained from proceeding at law to recover the estate. B. demurred, because the bill sought a discovery of matters constituting his case at law, and because the order for putting him to his election ought to be obtained on motion, and not at the hearing. The demurrer was overruled.—*Lowndes v. Davies*, Sim. 408.
3. (*Same.*) A bill of discovery is demurrable, if the words "stand to and abide such order and decree thereon," are inserted in the prayer of pro-

cess. (See *Angell v. Westcombe*, 6 Sim. 30.)—*James v. Herriott*, Sim. 428.

4. (*Same.*) A bill was filed against A. and others; but before he was served with a subpoena he went abroad. The bill was then amended by stating that A. was out of the jurisdiction; and a decree was made. A. then filed an original bill to impeach the decree, on the ground that he was in England when the former bill was filed, but was not served with process. The defendants demurred, on the ground that the decree could not be impeached except by a supplemental bill in the first suit. The demurrer was overruled, on the ground that A. might proceed as if no decree had been made in the former suit.—*Waterton v. Croft*, Sim. 431.
5. (*Plea.*) Where defendant pleaded to the whole bill, that he was a purchaser for valuable consideration, without notice, and by answer in support of the plea denied the charges of notice, the answer was held to overrule the plea.—*Lord Portarlington v. Soulby*, Sim. 336.

POWER.

Where the Court directed a deed of appointment as to the respective interests of a father and his children to be made within a limited time, and a deed was executed within the time, containing a power of revocation; it was held to be void, as disappointing the intention of the Court.—*Piper v. Piper*, M. & K. 159.

PRACTICE.

1. (*Bill of exceptions.*) On the trial of an issue, a bill of exceptions for an alleged misdirection of the judge will not lie: the regular course is to apply to the Court which directed the issue for a new trial.—*Armstrong v. Armstrong*, M. & K. 52.
2. (*Commission.*) Where a plaintiff obtained an order for a commission, but did not take it out: Held, that the defendant was entitled to a commission under the 17th Order of 1831.—*Rattenbury v. Fenton*, Sim. 368.
3. (*Contempt.*) An attachment issued against a defendant before the making of a motion by him, but after service of notice of the motion, will not prevent the motion being made.—*Jeyes v. Foreman*, Sim. 384.
4. (*Computation of time.*) The fourteen days mentioned in 11 Geo. 4 and 1 Will. 4, c. 36, s. 11, are exclusive of the first and inclusive of the last day.—*Amsdell v. Whitfield*, Sim. 356.
5. (*Costs.—Abandoned motion.*) Where a party gave notice of a motion and died before the motion was heard, and the suit was revived by his executors, who declined to proceed with the motion, and the bill of revivor was dismissed with costs, the costs of the abandoned motion were held not to be costs in the cause.—*Lewis v. Armstrong*, M. & K. 69.
6. (*Examination.*) Liberty was given to the plaintiff to re-examine one of his witnesses to part of an interrogatory, as to which the examiner had omitted to take down the deposition. (*Greills v. Gansell*, 2 P. W. 646; *Cox v. Allingham*, Jac. 337.)—*Bridge v. Bridge*, Sim. 352.

7. (*Exceptions.*) The master being about to report the defendant's third answer insufficient, a fourth answer was put in by the defendant, and he then moved to stay the report. The motion was refused, the Court having no right to deprive the plaintiff of the benefit of the 10th order.—*Russell v. Dight*, Sim. 430.
8. (*Exceptions.*) If one general exception is taken to the master's certificate, approving of interrogatories under a decree, and the Court is of opinion that one only of the interrogatories ought not to have been approved of, the exception will be allowed. (*Pearson v. Knapp*, 1 M. & K. 312; *Green v. Weaver*, 1 M. & K. 404.)—*Moore v. Langford*, M. & K. 323.
9. (*Infant.—Trustee.*) Where the Court, in any proceeding in a cause, declares a party to be a trustee within 11 Geo. 4 and 1 Will. 4, c. 60, it may, by the same order, direct a conveyance to be made.—*Walton v. Merry*, Sim. 328.
10. (*Injunction.—Amended bill.*) Under the 10th order of 1833, the common injunction cannot be obtained on an amended bill until five weeks after appearance, and if the defendant is then in default, the application must be made according to the old practice.—*Lee v. Ravenscroft*, Sim. 474.
11. (*Interrogatories.*) If in a creditor's suit a decree is made in the usual form, no special interrogatory for the examination of the defendants ought to be allowed, although a case for directing special inquiries is made on the record.—*Moore v. Langford*, Sim. 323.
12. (*Opening biddings.*) A motion to open biddings for several lots purchased by different purchasers, on an advance of a certain sum for each lot, is irregular.—*Goodall v. Pickford*, Sim. 379.
13. (*Same.*) An estate was put up to sale in four lots, and the timber on each lot was to be paid for by the purchaser, according to a valuation which had been made. A. purchased lot 1; the other lots were not sold. B. opened the biddings, and on the sale purchased lots 1 and 2 for 2140*l.*, and lot 3 at 380*l.* The Court refused to open the biddings for lots 1 and 2, on the application of A., unless he would advance 10*l.* per cent. on the price of the timber as well as the land, and would take lot 3 (in case B. should retire from it) at the price it had been sold for, in case it should not fetch the same price at the re-sale.—*Bates v. Bonnor*, Sim. 380.
14. (*17th Order.*) Where a decree in a cause in which previous references have been made, directs a reference to the master in rotation, the decree will be carried to the master to whom the previous references were made.—*Attorney-General v. Shore*, Sim. 460.
15. (*22d Order.*) Where a report of scandal or impertinence has been excepted to, the master cannot tax the costs of the reference under the 22d order of 1833, without a further order.—*Desanges v. Gregory*, Sim. 473.

16. (*Re-hearing*.) It is contrary to the practice of the Court to permit a second re-hearing before the Great Seal, unless under special circumstances. (*Fox v. Mackreth*, 2 Cox, 158; *Deerhurst v. Duke of St. Alban's*, 5 Mad. 232.)—*Mousley v. Carr*, M. & K. 205.
17. (*Revivor*.) A motion, before decree, by the executor of a deceased defendant, that the plaintiff might revive the suit against him, or that the bill might be dismissed, as against the deceased, was granted.—*Burnell v. Duke of Wellington*, Sim. 461.
18. (*Service*.) Personal service of an order for the payment of costs, by a plaintiff to a person not a party to the suit, will be dispensed with where the plaintiff cannot be found.—*Hunter v. —*, Sim. 429.
19. (*Suit to perpetuate*.) Leave was given to a plaintiff, before answer, to sue out a commission in a suit to perpetuate testimony, the defendant having been attached, and still refusing to answer. (*Codeney v. Athill*, 1 Dick. 355.) *Lancaster v. Lancaster*, Sim. 439.

PRINCIPAL AND SURETY.

R. S. and H. S. executed a joint and several bond, to secure a sum of money with interest to W.; after the deaths of R. S. and W., the executors of W. obtained from H. S. as principal, and from J. W. as surety, another bond, to secure a part of the money then due on the original bond, with interest. No payments were ever made in respect of the first bond, but after J. W.'s death the second bond was paid off out of his estate, and his representatives thereupon procured the original bond to be assigned to them: Held, that the executors of J. W. were entitled to rank as specialty creditors against R. S.'s estate, in respect of payments made by J. W., on the second bond to the extent of the penalty of the first. (*Copis v. Middleton*, 1 T. & R. 224.)—M. & K. 183.

PURCHASER.

A purchaser from a devisee, subject to debts and legacies, was held by the Vice Chancellor to be bound to see his money applied in payment of the legacies, if the circumstances of the transaction afford evidence that the debts have been paid, and that the devisee is dealing with the estate as owner, but the decree was reversed by Lord Lyndhurst.—*Johnson v. Kennett*, Sim. 384.

SEPARATE USE.

A trust for the separate use of a woman, whether single or married, is valid. (*Simson v. Jones*, 2 R. & M. 365. But see *Massey v. Parker*, 3 M. & K. 174.)—*Davis v. Thornycroft*, Sim. 420.

SETTLEMENT.

A court of equity will not direct payments made under a mistaken construction of a doubtful clause in a settlement, to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially where subsequent family arrangements have proceeded on the footing of that construction.—*Clifton v. Cockburn*, M. & K. 76.

SOLICITOR AND CLIENT.

If a solicitor retains money received by him in his character of solicitor for the use of his client, his bill is taxable, though it contains no charges for business done in a court of law or equity. (*Exp. Aitkin*, 4 B. & Ald. 47.)—*In the matter of Barker*, Sim. 476.

STATUTE OF LIMITATIONS.

G. R., a part-owner of a ship, was entrusted by A. and other part-owners, in 1799, with the management of the ship, and the accounts relating to it, until it was sold by G. R. in 1805. On the sale G. R. settled accounts with W., one of the part-owners, and paid him the balance due. G. R. died in 1824. On a bill in 1826, for an account, against the executors of G. R., it appeared that the debtor and creditor account between G. R. and A. was not carried on after 1805, but there were on the debt side two items in 1811 and 1812. It appeared also that A. had left England in 1820, and after his departure one of the witnesses called on G. R. and requested a settlement of the accounts between him and A., but he evaded the subject, and did not deny that he was indebted to A. An account was decreed against the executors of A. (*See Barber v. Barber*, 19 Ves. 180.)—*Robinson v. Alexander*, Bl. 352.

VOLUNTARY DEED.

A. made a voluntary assignment, by deed, of a policy of insurance upon his own life, to trustees, upon trust for the benefit of B. and her children, if she or they should outlive him. The deed was delivered to one of the trustees, but A. kept the policy in his own possession. No notice of the assignment was given to the assurance office, and A. afterwards surrendered for a valuable consideration the policy, and a bonus declared upon it, to the assurance office. On a bill by the surviving trustee against A., to have the value of the policy and bonus replaced: Held, that the gift was complete, and that the mere fact of the trustees not having given notice to the office, could not prejudice the cestui que trust. (*See Exp. Pye*, 18 Ves. 149.)—*Fortescue v. Bennett*, M. & K. 36.

WILL.

1. (*Construction.—Priority.*) J. H. charged his estates with an annuity in favour of his wife, and subject thereto he devised the estates in strict settlement. Afterwards, by his will and codicils, he charged the estates with several other annuities to his wife and other persons: Held, that the first-mentioned annuity was a pecuniary charge, but that there was no priority among the other annuities.—*Graves v. Hicks*, Sim. 391.
2. (*Same.—Limitation.*) J. H. by his will gave an annuity to his daughter, out of certain estates, for her separate use. By a codicil he gave her a life estate, for her separate use, in the same estates: Held, that the daughter took the life estate only.—*S. C.*
3. (*Same.—Substitution.*) J. H. devised an estate to his daughter for life, with remainder to her husband for life, and charged other estates with the payment of an annuity to her husband. He then made a codicil,

which, in effect, revoked the husband's life estate in remainder. By a subsequent codicil, he gave to the husband a life estate in possession in the first estate, and also an annuity in possession to the same amount, and charged upon the same estates as the former annuity: Held, that the second annuity was given in lieu of the first.—*S. C.*

4. (*Same.—Intestacy.*) A testator gave his whole property to his wife, on condition that she should pay an annuity of 130*l.* to his mother during her life, and after the death of his wife to be equally divided between those of his children who should survive her, share and share alike. All the testator's children died in the lifetime of his widow, who married again, and died, leaving her husband surviving her: Held, that the wife took a life interest only, and that on her death the property was undisposed of.—*Joslin v. Hammond*, M. & K. 110.
5. A testator bequeathed the residue of his estate to his daughters A. and B. in equal proportions, and in case of the death of either, the whole to the survivor of them; and in the event of their marrying and having children, then to the child or children of them, or the survivor of them, if they should attain the age of twenty-one years; but if not, then among the children of C. A. and B. survived the testator, and A., who died without having been married, bequeathed the whole of her property to B.: Held, that A. and B. did not take absolutely at the testator's death. (See *Jones v. Westcomb*, Pr. in Ch. 316; *Murray v. Jones*, 2 V. & B. 313.)—*Child v. Giblett*, M. & K. 71.
6. W. B. gave the interest of a fund to his wife for life, and after her death to such of his four daughters as should be then living, in equal shares, during their respective lives; and from and after the several deceases of his four daughters, he gave one-fourth of the capital to their respective children. One of the daughters died before the wife, leaving a child: Held, that the child took its mother's share immediately on her death.—*Woodstock v. Shillito*, Sim. 416.
7. (*Vesting.*) M. C. bequeathed a sum of money to A., if he attained twenty-one, but if he should not attain that age, or die without leaving issue male, then over: Held, that the legacy vested absolutely on A.'s attaining twenty-one.—*Mytton v. Boodle*, Sim. 451.
8. T. T. devised an estate to trustees, in trust for R. T. for life, and after his decease, in trust to convey the estate unto, between, or amongst all and every and such one or more of the child or children of R. T., who should be living at his decease, and the issue of such of them as should be then dead, leaving issue, such issue to take between or amongst them the share which their parent or parents would have been entitled to if living. R. T. survived T. T. and died, leaving children, and the issue of another child, who was dead at the date of the will: Held, that the issue of the deceased child were entitled to share. (See *Waugh v. Waugh*, 2 M. & K. 41.)—*Tytherleigh v. Hurbin*, Sim. 329.
9. (*Cross Remainders.*) J. L. devised an estate to S. C. for life, remainder to trustees to preserve, remainder to all the children of S. C. as tenants

in common, and not as joint tenants, and for want of such issue to M. H. for life, remainder to trustees to preserve, remainder to all the children of M. H. as tenants in common, and not as joint tenants, and for want of such issue to T. C. in fee: Held, that cross remainders by implication were created; and that the children of S. C. took estates for life, with cross remainders between them for life, with remainder to M. H. for life, with remainder to her children as tenants in common, with cross remainders between them for life, with remainder to T. C. in fee. (*Doe v. Webb*, 1 Taunt. 214; *Green v. Stephens*, 12 Ves. 419, 17 Ves. 64.)—*Ashley v. Ashley*, Sim. 358.

BANKRUPTCY.

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[Containing 4 Deacon & Chitty, Part 3 ; 1 Deacon, Part 1 ; and 3 Montagu & Ayrton, Part 3.]

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ACT OF BANKRUPTCY.

A bankrupt, pending a negotiation for the loan of money, was arrested in the country, and discharged on bail. He at the time promised to meet the creditor and his solicitor on the following day and give security. On the following day he went to London, in order to procure part of the loan, and therewith to pay the creditor the debt, instead of giving security. While there, he wrote to the solicitor, stating the fact and its object, and promised to return in a day or two and pay the debt. He was, however, detained longer in London, *bonâ fide*, upon the same negotiation : Held, that these circumstances negatived the intent to delay his creditors.—*Exp. Lavender*, M. & A. 484.

ACQUIESCENCE.

A bankrupt is not estopped from disputing the commission by surrendering, interfering in the choice of assignees, interposing as to the disposition of the estate, passing the last examination, or endeavouring to obtain the certificate.—*Exp. Chambers*, M. & A. 446.

AGREEMENT.

1. Where the petitioner covenanted with the bankrupt, that he would procure a lease to be granted to him of certain premises by a third person : Held, that this was an agreement for a lease within the 6 G. 4, c. 16, s. 75, and that the petitioner could call on the assignees to elect whether they would accept or decline the agreement.—*Exp. Benecke*, Dea. 186.
2. Where the bankrupt was insolvent in 1818, and a commission issued in 1832, under which he obtained his certificate previous to 6 G. 4, c. 16 : Held, that the interest in an agreement, entered into by the bankrupt subsequently to the certificate, did not pass to the assignees under the commission.—*Exp. Hanley*, M. & A. 426.

ALLOWANCE.

Though the assignees, with the concurrence of the commissioners, have ordered an allowance for maintenance, (under 6 G. 4, c. 16, s. 114,) till the bankrupt has passed his last examination, which order remains on the proceedings, yet if the assignees afterwards withhold the maintenance, on the ground of the final examination being adjourned *sine die*, the Court has no power to interfere, either as to the maintenance or the passing of the examination.—*Exp. Hall*, D. & C. 530.

ANNUITY.

An annuity was given by a father on his daughter's marriage by a letter to the intended husband, in these words: "I promise you, until it is convenient to me to do something better for you, to allow my daughter 100*l.* a year, which you can have as you may require:" Held, an annuity on the joint lives of father and daughter; and, though the consideration was incapable of valuation, to be proveable.—*Exp. Annandale*, D. & C. 511.

ARRANGEMENT.

A reference was made to the commissioner to report whether a pecuniary arrangement by the assignees would be beneficial to the estate.—*Exp. Bradstock*, M. & A. 490.

APPEAL.

The Lord Chancellor will not make an order, that an appeal from the Court of Review shall be brought on by petition, instead of special case, merely on the ground that the matters of law and fact are of a complicated nature, or that the affidavits are voluminous.—*Exp. —, In the matter of Maberly*, Dea. 75.

ASSIGNEES.

1. (*Dividend.*) On a dividend being withheld, the assignees were ordered to pay it, with five per cent. interest from the time of the application to them for payment.—*Exp. Story*, D. & C. 504.
2. (*Refusing to serve.*) Where two assignees were elected, one of whom was chosen without his own consent, and refused to serve, the Court directed a new choice altogether.—*Exp. Cattaral*, Dea. 193.
3. (*Purchasing.*) Where an assignee purchased part of the bankrupt's estate, which he improved, the estate was ordered to be resold, and put up at the price given by the assignee, adding the sum laid out in improvements. (*Exp. Hughes*, 6 Ves. 617.)—*Exp. Hewitt*, M. & A. 477.
4. (*Removal.*) Where an assignee purchases part of the estate without leave, the general rule is to remove him. (*Exp. Molineux*, 2 M. & A. 245.) *Exp. Alexander*, M. & A. 492.
5. (*Arrangement by.*) The sanction of the Court was given to a pecuniary arrangement by the assignees which affected the estate of the bankrupt. *Exp. Prater*, M. & A. 364.

ATTACHMENT.

The Court will not issue an attachment in the long vacation, unless there is fear of the party's absconding.—*Exp. Hunt*, D. & C. 503.

BANKRUPT.

1. Where the bankrupt vexatiously petitioned to supersede for want of an act of bankruptcy, which he was evidently aware of having committed, the petition was dismissed with costs against the bankrupt.—*Exp. Thompson*, D. P. C. 634.
2. On a petition to surrender, where there has been no wilful default on the bankrupt's part, he is entitled to his costs out of the estate.—*Exp. Smith*, M. & A. 382.

BUILDER.

A builder within the bankrupt laws is a person who builds for profit, either on his own or another's land.—*Exp. Neirinckx*, M. & A. 384.

CERTIFICATE.

1. (*Staying*.) The certificate will be stayed to enable a creditor to prove, when the reason for his not proving was a belief that no dividend would be paid.—*Exp. Perring*, M. & A. 486.
2. (*Signing*.) Where one commissioner had attended to the proceedings under a fiat, and had taken the bankrupt's last examination, and the bankrupt obtained the signature of another commissioner to his certificate, the Court referred the certificate back to the first commissioner, in order to examine the bankrupt, and decide whether he would sign his certificate.—*Exp. Burn*, M. & A. 483.
3. (*Same*.) The omission of the year in the date to the signature of a certificate by a creditor, where the date was properly attached to the preceding signature, was ordered to be rectified.—*In the matter of Buckley*, D. & C. 504.

COMMISSIONER.

1. The Court has no jurisdiction to control the discretion of a commissioner as to what documentary evidence he shall require to be produced to prove an act of bankruptcy. But the Court will intimate its opinion on the subject. *Exp. Groom*, D. & C. 640.
2. The Court cannot compel a commissioner to adjudicate a person a bankrupt; it can only order him to consider whether the evidence is sufficient to enable him to declare the party a bankrupt.—*Exp. Ward*, M. & A. 391.
3. The Court has no jurisdiction to order the commissioner to certify the consent of creditors to a supersedeas, especially when he objects because fees payable under 1 & 2 W. 4, c. 56, ss. 45, 46, are not paid.—*In the matter of Hawker*, D. & C. 569.

COMMITTAL.

1. An application for a warrant of commitment for disobedience of a four day order is *ex parte*, and quite of course.—*Exp. Hunt*, D. & C. 503.
2. An order of committal for disobedience of an order to pay money into Court will not be stayed under any circumstances, unless the party has paid the money in, or is ready to do so.—*Exp. Birkett*, D. & C. 503.
3. An order for a four day order, towards commitment, must be obtained by petition and not on motion; and the certificate of the registrar of non-conformity should be dated the very day of the application for the order.—*Exp. Myers*, D. & C. 579.

COMPOSITION.

1. (*Subsequent promise*.) Where a creditor enters into an agreement with his debtor to accept a composition on his debt, and to execute a release upon certain conditions, but the debt is never actually released; a sub-

sequent promise of the debtor, either express or implied, will revive the debt. (*Took v. Tuck*, 4 Bing. 224.)—*Exp. Crosley*, Dea. 107.

2. (*Same.*) Where the bankrupt entered into a deed of composition with his creditors, by which they released him from his debts, and afterwards gave a promissory note to one creditor for the remainder of his debt: Held, that the note was a mere *nudum pactum*, and bad as a petitioning creditor's debt.—*Exp. Hall*, Dea. 171.
3. (*Revival of debt.*) A composition creditor, who receives an assignment of debt, as a security for the composition, is not, when the old debt revives, entitled to retain the debts on a question of proof.—*Exp. Ellis*, M. & A. 370.
4. (*Same.*) In case of a composition, the original debt revives, on failure of the debtor in performing his undertaking, or on *bonâ fide* reviving of the old debt.—*Exp. Crosbie*, M. & A. 393.

COSTS.

1. (*Petition to substitute.*) If, on an application to substitute a petitioning creditor's debt by any other creditor, it appears that the original debt was proved under a mistake in law, and was reduced on legal grounds, and without fraud on the part of the original petitioning creditor, the costs shall come out of the estate. But *secus*, if the application to substitute is by the original petitioning creditor, though he comes to substitute even under such circumstances *in autre droit*.—*Exp. Rogers*, D. & C. 637.
2. (*Petition to tax.*) It is no objection to a petition to tax the solicitor's bill, that it contains allegations reflecting on the conduct of the solicitor: for, if such allegations are improper, they may be referred for scandal.—*Exp. Wells*, Dea. 69.
3. (*Retaxation.*) If the officer, in taxing a bill, disallows charges which are usually allowed, the Court will order a retaxation. *Aliter*, where the charges are not usually allowed; unless a special application is made to the Court, stating the reasons for such allowance.—*In the matter of Gray*, Dea. 105.
4. (*Bankrupt.*) The costs directed against a bankrupt were ordered to be set off against those directed in his favour.—*Exp. Hanley*, D. & C. 572.
5. (*Special case.*) The costs of preparing a special case form part of the costs of appeal to the Lord Chancellor, and should be taxed by the officer in Chancery. This Court intimated its opinion to that effect accordingly to such officer.—*Exp. Hanley*, D. & C. 572.
6. (*Of taxation.*) Upon an application that the solicitor may be directed to pay the costs of taxation, more than a sixth part having been taken off his bill, the Court will not enter into the particulars of the items of the bill.—*Exp. Millington*, Dea. 114.
7. (*Abandoned motion.*) On an abandoned notice of motion, the costs may be applied for, on an affidavit of service made on a day subsequently to that for which the notice was given.—*Exp. Stone*, M. & A. 503.

DOCKET.

The same creditor will not be allowed to strike another docket before the time for opening the fiat has expired. (*Exp. Llewellyn*, 2 M. & A. 298.)
—*In the matter of Gerrish*, M. & A. 491.

EQUITABLE MORTGAGEE.

The costs come out of the estate where an equitable mortgagee applies for leave to bid, and also for a sale.—*Exp. Berkeley*, D. & C. 572.

EVIDENCE.

The examinations of the bankrupt and other persons before the commissioners may be read in evidence, after notice has been given to the other side of the intention to read them, and may then, in all respects, be treated as affidavits.—*Exp. Crosley*, Dea. 107.

FIAT.

1. (*Amending.*) Where a fiat was unopened, it was allowed to be amended as to the description of the bankrupt's parish.—*In the matter of Humphrey*, D. & C. 484.
2. (*Annulling—Jurisdiction.*) The Lord Chancellor's jurisdiction to annul a fiat still subsists. (*Re. Nokes*, 1 M. & A. 472.) *In the matter of Chambers*, D. & C. 578.
3. (*Same*) The Court will not annul a fiat on the bankrupt's petition, though consented to by the petitioning creditor, on the ground that the bankrupt had made an arrangement for payment of the petitioning creditor's debt; without being satisfied that there were no other creditors of the bankrupt, or, that if there were any such, they consented to the application. *Exp. Parr*, Dea. 77.
4. (*Joint and separate.*) The Court will not annul a separate fiat, to give effect to a subsequent joint one, on the ground that the only witness who could prove the act of bankruptcy is kept out of the way; nor will they, for such cause, make an order for the inspection of the proceedings under the separate fiat, but will merely enlarge the time for opening the joint fiat.—*Exp. Burdekin*, Dea. 57.
5. (*Laches.*) Where the time for opening a town fiat is nearly run out, the Court will not, at the instance of petitioning creditor, supersede it, and issue a country fiat for the alleged convenience of the creditors.—*Exp. Bell*, D. & C. 481.
6. (*Married woman.*) After the issuing of the fiat, the petitioning creditor was informed that the party against whom it was issued was a married woman, and he and another person swore to their belief that she was so. The Court would not, on such slight information, annul the fiat, but merely suspended the prosecution of it until further order.—*Exp. Harland*, Dea. 75.
7. (*Opening.*) Where both the quorum Commissioners are unable to attend to open the fiat, the Court cannot make an order that the other three Commissioners may open it; but the proper course is to annul the fiat, and take out a new one.—*In the matter of Sutton*, Dea. 43.
8. (*Partners.*) Where a fiat issues against one member of a firm, another

fiat against another member will be ordered to go to the same Commissioners.—*Exp. Blake, M. & A.* 481.

JURISDICTION.

1. The Court has a general jurisdiction to entertain questions on the legality of commitments by the commissioners, upon petition, without *habeas corpus*, and without the warrant of commitment being before it; especially where the objections to the committal would not appear on the face of the warrant.—*Exp. Jones, D. & C.* 536.
2. A petition presented to the Lord Chancellor before the stat. 1 & 2 Will. 4, c. 56, must be transferred by the Lord Chancellor to the Court of Review before that Court can hear it.—*In the matter of Stokes, D. & C.* 578.

MARSHALLING.

Where two estates were devised charged with legacies, and the devisee mortgaged both and then became bankrupt, and both estates were sold, and the proceeds of one were sufficient to pay the legacies and mortgage-money: Held, that the legacies should be paid out of that.—*Exp. Hartley, M. & A.* 496.

OFFICIAL ASSIGNEE.

1. An official assignee ought not, except under very peculiar circumstances, to present a petition to the Court in his own name, he having no interest.—*Anon. Dea.* 106.
2. Where an official assignee becomes insolvent, the creditors' assignees will have leave to sue in the names of the registrars, giving them an indemnity, on the bond given to them by the sureties.—*Exp. Topham, M. & A.* 484.

PARTNERS.

1. (*Proof.*) A former partner, there being partnership debts unpaid, cannot petition to prove the balance of accounts, or to stay the certificate.—*Exp. Robinson, D. & C.* 499.
2. (*Transfer in books.*) One partner, before his marriage, agreed with his wife's trustees, that he would assign to them a portion of his capital in the business, to secure certain payments of 500*l.* on the trusts of his marriage settlement. In pursuance of this agreement, the partnership opened an account in their books with the trustees, in which they placed to the credit of the trustees the sum of 3000*l.*, and debited their partner with the same sum, giving the trustees notice that they had transferred this sum from their partner's private account. Default having been made in the payments of 500*l.*, and the firm having become bankrupt: Held, that this was an acknowledgment of a present debt from the firm to the trustees, the consideration for which was the intended marriage.—*Exp. Hill, Dea.* 123.
3. (*Solicitor.*) K. and F. partners, who were solicitors to the commission, had more than six years before received various sums of money on account of the estate, having a set-off in respect of their bill of costs, but which bill they did not deliver to the assignee till within six years. Beyond the six years K. and F. (upon an agreement that K. should pay all the debts) dissolved partnership; and the assignee, with knowledge of this fact, continued

to employ K. alone as the solicitor to the commission, and no attempt was made to charge F. with the monies received by the partner till very lately, viz. when an official assignee was appointed: nor had F. ever acknowledged any liability to account: Held, that as between F. and the creditors there was no bar, K. and F. being solicitors to the commission; but, that as the assignee was able to protect the estate, he should not, under these circumstances, call on F. to account.—*Exp. Gould, D. & C. 547.*

PETITION.

1. (*Attestation.*) The signature of one of three assignees to a petition was attested by the solicitor, who presented the petition under the word "witness," without stating him to be solicitor in the matter of the petition: Held, sufficient.—*Exp. Nunn, M. & A. 483.*
2. (*Service.*) When a petition stands over by arrangement to a particular day, an affidavit of service is not necessary for the dismissal, if the petitioners do not appear.—*Exp. Ward, M. & A. 391.*
3. (*Same.*) When a petition is not served within the proper time, it must be re-answered; which is done of course.—*Exp. Hanks, M. & A. 383.*
4. (*Same.*) The service of a petition to dismiss a petition for the taxation of costs need not be personal. Secus, the order for payment of the costs.—*Exp. Stephens, M. & A. 482.*
5. (*Same.*) A petition merely to supersede need not be personally served on the assignees, as no order is asked, a disobedience of which would bring the respondents into contempt.—*Exp. Hanks, M. & A. 383.*
6. (*Same.*) Service of an order on an assignee to elect to take or reject an agreement, was substituted, on affidavit of his purposely keeping out of the way.—*Exp. Handly, L. & C. 508.*
7. (*Standing over.*) An application for a petition to stand over should be made the day before the petition appears in the paper.—*Exp. Telfourd, M. & A. 389.*
8. (*Same.*) Where a petition was in the paper of the day, and a motion was made on notice, that it might stand over to amend, by adding a party respondent, the party moving was directed to pay the costs of all parties served with notice; but the petition not being called on, without the costs of the day.—*Exp. Story, D. & C. 504.*
9. (*To stay certificate.*) On the petition to prove and stay certificate, it is not necessary to charge directly what debt was tendered for proof to the commissioner, or when it was rejected.—*Exp. Robinson, D. & C. 499.*
10. (*Same.*) The certificate will not be stayed on a petition alleging information and belief, though supported by an affidavit swearing to the fact positively.—*Exp. Perring, M. & A. 486.*
11. (*Same.*) On a petition to stay a certificate, it must appear from the petition itself that the party applying is a creditor; if it appear merely inferentially, or from the affidavits in support, it is insufficient; and no amendment of the petition will be allowed.—*Exp. Robinson, D. & C. 499.*

PETITIONING CREDITOR.

A petitioning creditor is entitled to be repaid out of the estate a sum paid to a creditor to render him a competent witness to support the fiat.—*Exp. Forth, M. & A.* 381.

PROCEDENDO.

Although upon a fiat being superseded the Lord Chancellor has issued his confirmatory order, the Court of Review, upon a proper case on rehearing, can in effect order a *procedendo*, by means of its intimation to the Lord Chancellor. (See *Exp. Anger, 2 D. & C. 67.*)—*Exp. Lavender, D. & C.* 496.

PROOF.

1. (*Contingent debt.*) Where the bankrupt, before marriage, gave a bond, that if his wife should survive him, and should within two months after his death, at the costs and charges of his heirs or devisees, release her dower, his heirs or executors should, within three months after his death, pay to her 2000*l.* The wife survived but did not release her dower, though she was ready and willing to do so. Held, that the bond was not provable under the 6 Geo. 4, c. 16, s. 56. (*Perkins v. Kempland, 2 Bl. 1106.*)—*Exp. Davies, Dea.* 115.
2. (*Expunging.*) Where a double proof had been made more than six years back, but had only lately been discovered, it was ordered to be expunged. But the Court refused to direct that dividends received on the expunged proof more than six years back should be refunded. (*Exp. Moulst, 1 D. & C. 44.*)—*Exp. Soper, D. & C. 569.*
3. (*Joint and separate creditors.*) A., B. and C., partners, dissolve their partnership, by the retirement of B., who assigns all his share in the stock, debts, and effects to A. and C., but no notice of such assignment is given, individually, to the debtors of the partnership. A. and C. continue to carry on the trade till the death of A. A fiat is then issued against B. and C. as surviving partners of A., when some of the debts due to the firm of the three still remain uncollected: Held, that the joint creditors of the three could not prove against the separate estates of B. and C. as the outstanding debts of the three constituted joint property of them, existing at the time of the bankruptcy.—*Exp. Leaf, Dea.* 176.
4. (*Partners.*) A partnership between A., B. and C. was dissolved, the two first agreeing to pay all the partnership debts. D., a creditor, ignorant of the terms of dissolution, applied for payment; and A. and B. by letter begged time, and ultimately D. drew a bill on A., B. and C., which A. and B. accepted in the name of A., B. and C., but without C.'s authority. A. and B. also by letter signed by them promised payment of the bill. A. and B. became bankrupts, C. also became bankrupt: Held, that D. might prove the amount of the bill against the estate of A. and B.—*Exp. Liddiard, D. & C. 603.*
5. (*Security.*) A creditor having agreed to accept a composition for his debt takes bills for the amount of the composition and also has a bond assigned to him as part security for the composition. The composition deed con-

tained a clause that in default of payment of the instalments, the composition should fall to the ground. Default is made and subsequently a fiat issues: Held, that the creditor might prove the balance of the original debt remaining due, and also retain the bond.—*Exp. Read*, D. & C. 525.

REHEARING.

The Court will in general rehear petitions and rescind former orders upon fresh evidence tendered, but not where such orders are made upon petitions to stay a certificate, or to supersede or annul fiats.—*Exp. Lavender*, D. & C. 497.

REPUTED OWNERSHIP.

1. (*Trust.*) A. and B. partners, as consignees of a West India estate, became creditors to the estate. By deed long prior to the bankruptcy, the estate was conveyed to trustees, A. being one, in trust to apply the proceeds, *inter alia*, in paying off the debt due to A. and B. They assigned their debt to C. and Co., and then became bankrupt; but prior thereto they received sugars, which remained in the docks, earmarked in their name, at the time of the bankruptcy. Shortly after the bankruptcy other sugars arrived, consigned by the bill of lading to the bankrupts, which were received by the assignees, who also took the first sugars: Held, that the sugars came to A. and B. clothed with trusts to pay the proceeds to A. as trustee, and were not in the reputed ownership of the bankrupts; but that they must be applied in discharge of the debt assigned to C. and Co., and the other trusts of the deed. (*Exp. Waring*, 19 Ves. 345; *Exp. Copeland*, 3 D. & C. 199.)—*Exp. Smith*, D. & C. 579.
2. (*Shares.*) By the rules of a joint stock company, only principals could become subscribers. The petitioner purchased shares in the name of the bankrupt, who verbally declared that he held them as a trustee for the petitioner, and the certificates of the shares were kept in the possession of the petitioner; but no notice was given to the company of the trust, nor did the bankrupt sign a written declaration of trust until seven days before the fiat was issued: Held, that the shares were in the order and disposition of the bankrupt.—*Exp. Ord*, Dea. 166.
3. (*Same.*) In the deposit of shares of an insurance company, where all the parties are partners thereof, the transaction itself is sufficient notice to prevent reputed ownership.—*Exp. Waithman*, M. & A. 364.
4. (*Separate Property.*) *Semble*, furniture, the separate property of one partner, and used by the firm, is not in the reputed ownership of the firm.—*Exp. Hare*, M. & A. 478.
5. (*Wife's separate property.*) Furniture, the separate property of the wife, does not pass to the assignees under a fiat against the husband.—*Exp. Ellison*, M. & A. 365.

SET-OFF.

H. and P., drawers of a bill on and accepted by P. and Co. for 2000*l.*, endorsed it to A. for his accommodation. W. and Co. discounted it for A., together with another bill drawn by A. for 2000*l.* upon and accepted by S.

and Co. A. and H. and P. and S. and Co. severally become bankrupts. W. and Co. receive dividends from S. and Co.'s estate to the amount of 666*l.* 13*s.* 4*d.* on S. and Co.'s acceptance; also 750*l.* from H. and P.'s estate on the bill drawn by them. They also prove against A.'s estate for 3333*l.* 6*s.* 8*d.*, as the amount of H. and P.'s bill, and balance of A.'s bill on S. and Co., after deducting the 666*l.* 13*s.* 4*d.* received from S. and Co., and receive 277*l.* 15*s.* 6½*d.* dividend thereon, 166*l.* 13*s.* 4*d.* being in respect of the proportion of proof on H. and P.'s bill. P. and Co. stopped payment, and under a composition deed, W. and Co. receive 1000*l.* in respect of H. and P.'s bill. Total in respect of H. and P.'s bill, 1916*l.* 13*s.* 4*d.* leaving a balance of 83*l.* 6*s.* 8*d.* *Semble*, (W. and Co. claiming to have a right to retain H. and P.'s bills in order to work out their remedies against A. in respect of A.'s bills,) that the assignees of H. and P., although they tendered the balance of 83*l.* 6*s.* 8*d.*, could not compel W. and Co. to deliver up H. and P.'s bill.—*Exp. Dickson*, D. & C. 614.

SEQUESTRATOR.

A bankrupt sequestrator will be restrained from receiving any proceeds adversely to the assignees.—*Exp. Hall*, M. & A. 392.

SLAVES.

An equitable mortgage of slaves in Antigua cannot be constituted by the deposit of a registered title-deed containing a schedule of the slaves, if the memorandum accompanying the deposit which is registered, does not contain a list of the slaves.—*Exp. Borrodaile*, M. & A. 398.

SOLICITOR.

1. (*Bidding*.) The Court will not, except under very peculiar circumstances, give leave to the solicitor to the fiat to bid at a sale of the bankrupt's property.—*Exp. Towne*, D. & C. 519.
2. (*Deposit of deeds*.) A solicitor cannot take a deposit of title-deeds as a security for future bills. (*Exp. Bovill*, V. C. 1826.)—*Exp. Laing*, M. & A. 38.
3. (*Liability*.) Where the assignees, on the representation of the solicitor to the commission that he is authorized to receive it as agent, pay over a dividend to such solicitor, and it turns out that he had no such authority: upon a petition of the creditor for payment to him of the dividend, stating that no authority was given to that solicitor: Held, that being solicitor to the commission he might be made respondent with the assignees, and that a joint order might be made against all for payment.—*Exp. Story*, D. & C. 504.
4. (*Re-taxing bill*.) Solicitor's bill taxed, and paid six years back, will not be ordered to be re-taxed without special reasons.—*Exp. Hutchinson*, D. & C. 530.
5. (*Striking off roll*.) Though the rule of another Court for striking an attorney off the roll be produced, *semble*, an order nisi only can be obtained in this Court in the first instance.—*In the matter of Mark*, D. & C. 482.

SUPERSEDEAS.

1. A supersedeas with the consent of nine-tenths of the creditors was allowed, though the commissioners' certificate did not state what proportion the creditors assenting bore to those who proved.—*Exp. Hinton, M. & A.* 361.
2. On a bankrupt's petition to supersede, depositions of the trading and act of bankruptcy may be read in Court, so as to give him an opportunity of answering them.—*Exp. Lavender, D. & C.* 486.

SURETY.

The petitioning creditor issued the fiat on a debt of 700*l.*, the greater part of which having been contracted during the bankrupt's minority, and not for necessities, the debt was reduced below 100*l.*, and was therefore insufficient to support the fiat. The petitioning creditor had also accepted bills for the accommodation of the bankrupt, which having been indorsed by the bankrupt to A., A. proved them under the fiat. The petitioning creditor subsequently paid these bills. Held, that on indemnifying A., and on presenting a petition in the name of A., the petitioning creditor was entitled, under 6 Geo. 4, c. 16, ss. 18 and 52, as a surety paying the debt, to substitute the debt so proved on the bills by A. for the original petitioning creditor's debt, so as to support the fiat.—*Exp. Rogers, D. & C.* 638.

TRUST.

A sum of money was payable under a will—to the bankrupt for life, remainder to his children; and the trustees (of whom the bankrupt was one) were empowered to lend the principal to the bankrupt firm, which they did: Held, that the dividend on a proof against the firm should be invested in stock, the interest on which was to accumulate until the principal sum was made good. (*Mitford v. Mitford*, 9 Ves. 100.)—*Exp. King, Dea.* 143.

UNCLAIMED DIVIDENDS.

The interest made by the investment of unclaimed dividends, does not belong to the general estate, but is divisible among the creditors claiming the hitherto unclaimed dividends.—*Exp. Renshaw, D. & C.* 483.

VIVA VOCE EXAMINATION.

1. Where a petitioner files no affidavits in support of his petition, but two days before the day of hearing serves notice to examine witnesses on the respondent, resident twenty miles from London, the Court refused the application of the respondent to postpone the hearing, so as to procure witnesses in answer, till after petitioner's witnesses were examined.—*Exp. Lavender, M. & A.* 485.
2. On the consent of all parties, a *viva voce* examination will be ordered in any stage of the proceedings. If affidavits have been filed on both sides, (in the absence of consent,) the Court will first hear the affidavits read, and then, if it thinks fit, will order a *viva voce* examination. If one

party has not relied on affidavits, he, on a proper case made by motion and affidavit, may obtain such examination.—*Exp. Dugard*, D. & C. 521.

3. Semble, that a petitioner, who is also assignee, and is proposed to be examined as a witness by the respondents, is excepted from the general rule for excluding witnesses during *visá voce* examinations.—*Exp. Dugard*, D. & C. 524.

WAGES.

Under the 6 Geo. 4, c. 16, s. 48, it is not requisite to prove a hiring for a year certain, but it must be something more than a ~~mere~~ hiring by the week.—*Exp. Collier*, D. & C. 520.

WIFE OF BANKRUPT.

1. The wife of a bankrupt has a right to a reasonable provision out of the property which she brought her husband on her marriage; and the Court of Review has jurisdiction, on petition in bankruptcy, to order the assignees to make such provision for her, whether the property consists of real or personal estate. (See *Oswell v. Probert*, 2 Ves. 680.)—*Exp. Thompson*, Dea. 90.
2. An allowance of 200*l.* a year, out of a net income of 225*l.* a year, was deemed excessive, and reduced to 175*l.* per annum.—*S. C.*

WITNESS.

When the drawer of a bill accepted by the bankrupt, but which he had indorsed over, and which was not yet proved against the estate, swore to a deposition in support of the fiat, stating himself therein not to be a creditor: Held, that his deposition could not be rejected on the ground of his being a creditor.—*Exp. Lavender*, D. & C. 437.

LIST OF CASES.

COMMON LAW.

Abbott v. Burbage, 2 Bing. N. C. 444	..	..	..	Bankruptcy, 1
Adams v. Power, 7 C. & P. 76	..	..	..	Practice, 21
Agar v. Blethyn, 2 C., M. & R. 699; 1 Tyr. & G. 160				Husband and wife, 1
Allen v. Perring, 5 N. & M. 374	..	..	..	Arbitration, 2
Amner v. Clark, 2 C., M. & R. 468	..	..		Bill of Exchange, 4
Anderson, in re, 2 Bing. N. C. 435	..	..		Husband and Wife, 2
Andrews v. Smith, 2 C., M. & R. 627	..	..	..	Frauds, Statute of, 2
Arden v. Garry, 2 Scott, 188	..	..	..	Writ of Trial Act, 1
Attorney-General v. Greaves, 2 C., M. & R. 669; 1 Tyr. & G. 484				Customs Acts, 1
Avery v. Chesslyn, 5 N. & M. 372	..	..	..	Fixtures
Barker v. Malcom, 7 C. & P. 101	..	..	..	Practice, 22
Barlow v. Leeds, 5 N. & M. 426	..	..	..	Practice, 3
Barrons v. Luscombe, 5 N. & M. 350	..	..		Justices, 1; Overseers, 1
Barwick, in re, 5 Tyr. 431	..	..		Executor and Administrator, 2
Baxter v. Clarke, 2 C. M. & R. 734; 1 Tyr. & G. 133	..			Prisoner, 2
Battersly v. Kirk, 2 Bing. N. C. 584	..	..	..	Ireland
Beaumont v. Dean, 4 D. P. C. 354	..	..	..	Affidavit, 3
Bees v. Williams, 2 C., M. & R. 581; 1 Tyr. & G. 23				Landlord & Tenant, 4
Beswick v. Swindells, 5 N. & M. 378	..	..	..	Bond
Blanchard v. Bridges, 5 N. & M. 567	..	..	..	Easement
Blewett v. Tregonning, 5 N. & M. 234, 308	..			Custom, 1, 2; Evidence, 3; Prescription
Bone v. Dawe, 5 N. & M. 230	..	..	..	Costs, 1
Boond v. Woodall, 2 C., M. & R. 601; 1 Tyr. & G. 11; 4 D. P. C. 351				Interpleader Act, 4
Botheroyd v. Woolly, 5 Tyr. 522	..	..		Landlord and Tenant, 2
Broad v. M'Calmer, 5 N. & M. 413	..	..	..	Brokerage
Brogden v. Marriott, 2 Bing. N. C. 473	..	..	..	Pleading, 4
Brook v. Biggs, 2 Bing. N. C. 572	..	..		Landlord and Tenant, 1
—— v. Turner, 2 Bing. N. C. 422	..	..	..	Devise, 3
Brown v. Tayleur, 5 N. & M. 472	..	..	..	Insurance, 1
Buxton v. Spires, 2 C., M. & R. 601; 1 Tyr. & G. 74; 4 D. P. C. 365				Lords' Act, 1
Cann v. Facey, 5 N. & M. 405	..	..	..	Costs, 6
Canst v. Hughes, 2 Bing. N. C. 448	..	..	..	Trover, 1
Casley v. Smyth, 4 D. P. C. 477	..	..	..	Affidavit, 5
Chalkley v. Carter, 4 D. P. C. 480	..	..	..	Process, 5

Chapman v. Gatcombe, 2 Bing. N. C. 516	.. .. .	Tithes
Charrington v. Meatheringham, 4 D. P. C. 479	.. .. .	Practice, 17
Clarke v. Allbutt, 1 Tyr. & G. 71	.. .. .	Practice, 7
Clay v. Stephenson, 5 N. & M. 318	.. .. .	Witness, 1
Connop v. Holmes, 2 C., M. & R. 719; 1 Tyr. & G. 85; 4 D. P. C. 451		Bill of Exchange, 7
Cousins v. Paddon, 2 C., M. & R. 547; 5 Tyr. 535; 4 D. P. C. 488.		Pleading, 6, 7
Cox v. Peacock, 2 Scott, 125	.. .. .	Executor and Administrator, 1
Coxhead v. Huish, 7 C. & P. 63	.. .. .	Pleading, 15; Practice, 20
Crease v. Barrett, 2 C., M. & R. 738; 1 Tyr. & G. 112	.. .. .	Costs, 10
Creevy v. Carr, 7 C. & P. 64	.. .. .	Libel, 3
Cumpston v. Haigh, 2 Bing. N. C. 449	.. .. .	Lien
Davies v. Acocks, 2 C., M. & R. 461	.. .. .	Insolvent
—— v. Lloyd, 1 Tyr. & G. 28; 4 D. P. C. 478	.. .. .	Writ of Trial Act, 2
Derosne v. Fairie, 2 C., M. & R. 476; 5 Tyr. 393	.. .. .	Patent
Dobell v. Hutchinson, 5 N. & M. 251	.. .. .	Auction; Frauds, Statute of, 1
Doe d. Boydell v. Gillett, 2 C., M. & R. 579; 1 Tyr. & G. 114	.. .. .	Insolvent, 2
—— Chandler v. Ford, 5 N. & M. 209	.. .. .	Annuity
—— Edmunds v. Llewellyn, 2 C., M. & R. 503	.. .. .	Copyhold
—— Edwards v. Johnson, 5 N. & M. 281	.. .. .	Devise, 1
—— Higgs v. Terry, 5 N. & M. 556	.. .. .	Overseers, 2
—— Preedy v. Holton, 5 N. & M. 391	.. .. .	Devise, 2
—— Protheroe v. Roe, 4 D. P. C. 385	.. .. .	Ejectment, 2
—— Robins v. Warwick Canal Company, 2 Bing. N. C. 483	.. .. .	Act of Parliament, 3
—— Smith v. Fleming, 2 C., M. & R. 638	.. .. .	Devise, 4
—— v. Hardy, 4 D. P. C. 356	.. .. .	Practice, 11
—— Smithers v. Roe, 4 D. P. C. 374	.. .. .	Ejectment, 1
—— Strode v. Seaton, 2 C., M. & R. 728; 1 Tyr. & G. 19	.. .. .	Estoppel; Evidence, 2
—— Wheble v. Fuller, 1 Tyr. & G. 17	.. .. .	Landlord and Tenant, 3; Stamp, 3
—— Whetherell v. Bird, 7 C. & P. 6	.. .. .	Admission
—— Wilkins v. Wilkins, 5 N. & M. 434	.. .. .	Adverse Possession, 1; Evidence, 1
Duckworth v. Fogg, 2 C., M. & R. 736; 4 D. P. C. 396	.. .. .	Lancaster Court of Common Pleas
Easton v. Pratchett, 2 C., M. & R. 542	.. .. .	Bill of Exchange, 8
Edwards v. Danks, 4 D. P. C. 357	.. .. .	Bail, 10
Evans v. Delegal, 4 D. P. C. 374	.. .. .	Attorney, 10
—— v. Dignam, 4 D. P. C. 359	.. .. .	Attorney, 9
Faith v. M'Intyre, 7 C. & P. 44	.. .. .	Practice, 19; Witness, 4
Fenton, in re, 5 N. & M. 239	.. .. .	Attorney, 2
Ferguson v. Mitchell, 2 C., M. & R. 687	.. .. .	Pleading, 10
Fife v. Bruere, 4 D. P. C. 329	.. .. .	Practice, 7*
Fletcher v. Lew, 5 N. & M. 351	.. .. .	Costs, 4
Foot v. Sheriff, 2 Bing. N. C. 528	.. .. .	Writ of Right, 2
Forster v. Kirkwall, 4 D. P. C. 370	.. .. .	Practice, 8*
Gilbert v. Whalley, 2 C., M. & R. 722	.. .. .	Sheriff, 1

Godson v. Freeman, 2 C., M. & R. 585 ; 1 Tyr. & G. 35	Executor and Administrator, 5
Goldney v. Laporte, 2 Bing. N. C. 456	Bail, 1
Gongenheim v. Lane, 4 D. P. C. 482	Costs, 13
Goodricke v. Turley, 2 C., M. & R. 636, 637, 694 ; 1 Tyr. & G. 146, 149 ; 4 D. P. C. 392, 431, 498	Affidavit, 4 ; Bail, 3 ; Oyer
Gosbell v. Archer, 5 N. & M. 523	Costs, 8
Grace v. Morgan, 2 Bing. N. C. 534	Distress
Green v. Button, 2 C., M. & R. 707 ; 1 Tyr. & G. 118	Pleading, 12
Griffin v. Yates, 2 Bing. N. C. 579	Pleading, 3
Hall v. Maule, 5 N. & M. 455	Prohibitions, 1
— v. Middleton, 5 N. & M. 410	Pleading, 2
Harding v. Jones, 1 Tyr. & G. 135	Bill of Exchange, 2
Hemming v. Trenery, 2 C., M. & R. 385	Guarantee
Hinton v. Deane, 4 D. P. C. 352	Attorney, 7
Hodson v. Marshall, 7 C. & P. 16	Witness, 3
Hodgson v. Mee, 5 N. & M. 302	Bail, 7
Holland v. Reeves, 7 C. & P. 36	Evidence, 4
Holmes v. Mentze, 5 N. & M. 563	Interpleader Act, 2
Hooper v. Truscott, 2 Bing. N. C. 457	Slander
Howell v. Bowers, 2 C., M. & R. 621 ; 1 Tyr. & G. 88 ; 4 D. P. C. 386	Welch Judgment
Hughes v. Hughes, 2 C., M. & R. 663 ; 1 Tyr. & G. 4	Costs, 2
Huzzey v. Field, 2 C., M. & R. 432	Ferry ; Master and Servant, 2
James v. Salter, 2 Bing. N. C. 505	Limitations, Statute of
Jenkins v. Harvey, 2 C., M. & R. 393	Port duty
Johnson v. Kennedy, 4 D. P. C. 345	Practice, 9
Jones v. Palmer, 4 D. P. C. 446	Practice, 16
Jourdain v. Johnson, 2 C., M. & R. 564 ; 5 Tyr. 524	Pleading, 8, 9
Kirk v. Clark, 4 D. P. C. 363	Interpleader Act, 5
Knight's bail, 4 D. P. C. 388	Bail, 4
Lancaster v. Hemmington, 5 N. & M. 538	Arbitration, 1
Lazarus v. Levaux, 4 D. P. C. 353	Bail, 9
Lees v. Kendall, 5 N. & M. 340	Costs, 3
Leigh v. Leigh, 2 Bing. N. C. 464	Writ of Right, 1
Lester v. Lazarus, 2 C., M. & R. 665 ; 1 Tyr. & G. 129 ; 4 D. P. C. 397, 445	Attorney, 8 ; Practice, 15
Lewis v. Glossop, 2 C., M. & R. 665	Bail, 4
— v. Lyster, 2 C., M. & R. 704 ; 4 D. P. C. 377	Bill of Exchange, 6
— v. Newton, 2 C., M. & R. 732 ; 1 Tyr. & G. 72 ; 4 D. P. C. 355	Process, 2
— v. Wells, 7 C. & P. 221	Practice, 23
Lord, in re, 2 Scott, 131	Attorney, 6
— v. Hope, 5 Ty. 487	Practice, 6
Lowe v. Attorney-General, (in the Exchequer Chamber), 2 C., M. & R. 544	Customs' Act, 2
Lysons v. Barrow, 2 Bing. N. C. 486	Executor and Administrator, 4

Macdougall v. Nicholls , 5 N. & M. 366	.. .. .	Practice, 4
Maddocks v. Phillips , 5 N. & M. 370	.. .. .	Executor and Administrator, 3
Marris, in re , 1 Ad. & E. 582	.. .. .	Attorney, 1
Marah v. Monckton , 1 Tyr. & G. 34	.. .. .	New Trial, 2
Mason v. Lee , 5 N. & M. 240	.. .. .	Process, 1
Meredith v. Stocker , 1 Tyr. & G. 76; 4 D. P. C. 499	.. .. .	Practice, 8
Milburn v. Edgar , 2 Bing. N. C. 498	.. .. .	Adverse Possession, 2
Milligan v. Thomas , 2 C., M. & R. 756; 1 Tyr. & G. 134; 4 D. P. C. 373	.. .. .	Writ of Trial Act, 4
Mitchell v. Darthez , 2 Bing. N. C. 555	.. .. .	Freight
Moore v. Eddowes , 7 C. & P. 203	.. .. .	Lords' Act, 2; Pleading, 17
Newbury, in re , 5 N. & M. 419	.. .. .	Attorney, 3
Nicolls v. Bastard , 2 C., M. & R. 659; 1 Tyr. & G. 156	.. .. .	Trover, 3
Noel v. Boyd , 4 D. P. C. 415	.. .. .	Pleading, 14
Norrish v. Richards , 5 N. & M. 268	.. .. .	Inferior Court
Owen v. Pugh , 1 Tyr. & G. 26	.. .. .	New Trial, 1
Paddon v. Bartlett , 5 N. & M. 383, 384, n. Judgment; Limitations, Statute of, 3	.. .. .
Parker v. Gossage , 2 C., M. & R. 617; 1 Tyr. & G. 105	.. .. .	Insolvent, 3
Parsons, in re , 5 N. & M. 241	.. .. .	Attorney, 3
Perrin v. West , 5 N. & M. 291	.. .. .	Affidavit, 1; University of Oxford
Pepper v. Whalley , 5 N. & M. 437	.. .. .	Pleading, 1
Phillips, Exp. 2 Ad. & E. 586	.. .. .	Certiorari
Pickford v. Ewington , 1 Tyr. & G. 29; 4 D. P. C. 453	.. .. .	Affidavit, 6
Pilcher v. Woods , 4 D. P. C. 329	.. .. .	Practice, 10
Pinner v. Arnold , 2 C., M. & R. 613; 1 Tyr. & G. 1	.. .. .	Stamp, 2
Pooley v. Goodwin , 5 M. & N. 466	.. .. .	Interpleader Act; Stamp, 1
Potter v. Newman , 2 C., M. & R. 742; 1 Tyr. & G. 29	.. .. .	Arbitration, 5
Quick, Exp. 2 Scott, 184	.. .. .	Costs, 9
Ray v. Sharp , 4 D. P. C. 354	.. .. .	Practice, 10
Ramsden v. Maugham , 2 C., M. & R. 634; 1 Tyr. & G. 40; 4 D. P. C. 403	.. .. .
	.. .. .	Process, 3
Raymond v. Fitch , 2 C., M. & R. 588	.. .. .	Executor and Administrator, 6
Reay v. Richardson , 2 C., M. & R. 422	.. .. .	Debtor and Creditor, 1
Reed v. Gamble , 5 N. & M. 433	.. .. .	Bill of Exchange, 1
Rex v. Ady , 7 C. & P. 140	.. .. .	False Pretences
— v. Archdeacon of Middlesex , 5 N. & M. 494	.. .. .	Churchwarden
— v. Bradshaw , 7 C. & P. 233	.. .. .	Rescous
— v. Carter , 7 C. & P. 134	.. .. .	Forgery, 1
— v. Compton , 7 C. & P. 139	.. .. .	Burglary, 1
— v. Dignan , 4 D. P. C. 359	.. .. .	Attorney, 9
— v. Fagent , 7 C. & P. 238	.. .. .	Evidence, 7
— v. Faulkner , 2 C., M. & R. 525	.. .. .	Bankruptcy, 2
— v. Forbes , 7 C. & P. 224	.. .. .	Forgery, 2
— v. Foster , 7 C. & P. 148	.. .. .	Evidence, 5
— v. Gray , 7 C. & P. 164	.. .. .	Rape
— v. Greame , 2 Ad. & E. 615	.. .. .	Mandamus, 1

Rex v. Hulme, 7 C. & P. 8	.. .. .	Witness, 2
— v. Inhabitants of Great Wishford, 5 N. & M. 540	..	Settlement, 5
— v. ——— Mabe, 5 N. & M. 241	.. ..	Settlement, 2
— v. ——— of Oldbury, 5 N. & M. 547	..	Order of Removal, 2
— v. ——— St. Mary, Leicester, 5 N. & M. 215	..	Settlement, 1
— v. ——— Willoughby, 5 N. & M. 457	.. ..	Settlement, 3
— v. ——— Woolpit, 5 N. & M. 526	.. ..	Settlement, 4
— v. ——— Woking, 5 N. & M. 395	.. ..	Poor Rate
— v. ——— Ivers, 7 C. & P. 213	.. ..	Innkeeper
— v. Justices of Caernarvonshire, 5 N. & M. 364	..	Affidavit, 2; Order of Filiation
— v. ——— Cambridgeshire, 5 N. & M. 440	.. ..	Highway, 1
— v. ——— Middlesex, in Spicer v. Pearce, 4 D. P. C. 358	..	Bail, 11
— v. ——— Suffolk, 5 N. & M. 503	.. ..	Order of Removal
— x. ——— Surrey, in Showell v. Young, 2 O., M. & R. 698; 1 Tyr. & G. 32	.. ..	Bail, 8
— v. Mirehouse, 2 Ad. & E. 632	.. ..	Mandamus, 2
— v. Mooley, 5 N. & M. 261	.. ..	Office
— v. Leeds and Selby Railway Company, 5 N. & M. 247	..	Act of Parliament, 1
— v. Price, 7 C. & P. 178	.. ..	Poaching
— v. Ramsden, 5 N. & M. 325	.. ..	Quo Warranto
— v. Rawlings, 2 C., M. & R. 471; 4 D. P. C. 407	.. ..	Extent
— v. Rawlins, 7 C. & P. 150	.. ..	Burglary, 2
— v. Rivers, 7 C. & P. 177	.. ..	Evidence, 6
— v. Round, 5 N. & M. 427	.. ..	Mandamus, 4
— v. Trustees of St. Pancras New Church, 5 N. & M. 219	..	Mandamus, 3; Vestry Act
— v. Sedgwick, 2 C., M. & R. 603; 1 Tyr. & G. 94	.. ..	Auction Duty
— v. Sheriff of Lincolnshire, in Burton v. Gee, 2 C., M. & R. 656; 1 Tyr. & G. 93; 4 D. P. C. 455	..	Bail 5
— v. Sutton, 5 N. & M. 353	.. ..	Infant
— v. The Nottingham Old Waterworks Company, 5 N. & M. 498	.. ..	Act of Parliament, 2
— v. Tottenham, 7 C. & P. 237	.. ..	Arson
— v. Whitney, 7 C. & P. 208	.. ..	Highway, 2
— v. Wiltshire and Berkshire Canal Company, 5 N. & M. 344	..	Corporation
— v. Wright, 7 C. & P. 159	.. ..	Larceny
Roberts v. Williams, 2 C., M. & R. 561; 5 Tyr. 553; 4 D. P. C. 486	..	Justices, 2
Robinson v. Brooksbank, 4 D. P. C. 397	.. ..	Cognovit
Rock v. Johnson, 2 C., M. & R. 635, n.; 1 Tyr. & G. 43; 4 D. P. C. 405	..	Process, 3
Rogers v. Banger, 4 D. P. C. 411	.. ..	Costs, 12
— v. Humphreys, 5 N. & M. 511	.. ..	Mortgagor and Mortgagee
Rooke v. Sherwood, 4 D. P. C. 363	.. ..	Practice, 13
Rosset v. Hartley, 5 N. & M. 415	.. ..	Practice, 2
Schultz v. Astley, 2 Bing. N. C. 545	.. ..	Bill of Exchange, 3
Sheriff v. Gresley, 5 N. & M. 491	.. ..	Attorney, 5
Short v. Williams, 4 D. P. C. 357	.. ..	Prisoner, 1
Silk v. Humphrey, 7 C. & P. 14	.. ..	Practice, 18

Simpson v. Clayton, 2 Bing. N. C. 467	.. .. .	Nonsuit
Smedley v. Joyce, 2 C., M. & R. 721; 1 Tyr. & G. 84; 4 D. P. C. 421		Pleading, 11
Smith v. Eldridge, 5 N. & M. 408	.. .. .	Practice, 5
Smyth, Exp. 2 C., M. & R. 748	.. .. .	Prohibition, 2
Soames v. Rawlings, 2 C., M. & R. 744; 1 Tyr. & G. 46	.. .. .	Court of Requests
Spyer v. Thelwell 2 C., M. & R. 692	.. .. .	Bill of Exchange, 5; Pleading, 10
Staines v. Stoneham, 2 C., M. & R. 658	.. .. .	Bail, 6
Stamford v. M'Cann, 2 C., M. & R. 632; 4 D. P. C. 637	.. .. .	Bail, 2
Stevens v. Ufford, 7 C. & P. 97	.. .. .	Pleading, 16
Symes v. Goodfellow, 2 Bing. N. C. 532	.. .. .	Arbitration, 3
Tarpley v. Blabey, 2 Bing. N. C. 437	.. .. .	Libel, 1
Thomas v. Morgan, 2 C., M. & R. 496	.. .. .	Pleading, 5
Thorne v. White, 1 Tyr. & G. 110	.. .. .	Insolvent, 4
Thorp v. Cole 2 C., M. & R. 367; 4 D. P. C. 457	.. .. .	Arbitration, 4
Tipton v. Gardiner, 5 N. & M. 424	.. .. .	Costs, 7
Tucker v. Brand, 4 D. P. C. 411	.. .. .	Process, 4
Van Nieuwoel v. Hunter, 5 N. & M. 376	.. .. .	Costs, 5
Verral v. Robinson, 2 C., M. & R. 495	.. .. .	Trover, 2
Waddilove v. Barnett, 2 Bing. N. C. 538; 4 D. P. C. 347	.. .. .	Pleading, 13
Wainwright v. Bland, 2 C., M. & R. 740; 1 Tyr. & G. 37	.. .. .	Costs, 11
Wandley v. Smith, 2 C., M. & R. 716	.. .. .	Bastardy Bond
Warne v. Beresford, 4 D. P. C. 361	.. .. .	Practice, 12
Waters v. Tompkins, 2 C., M. & R. 723; 1 Tyr. & G. 137	.. .. .	Limitations, Stat. of, 2
Watson v. Denton, 7 C. & P. 85	.. .. .	Warranty
West v. Rotherham, 2 Bing. N. C. 527	.. .. .	Interpleader Act, 3
Wenham v. Downes, 5 N. & M. 244	.. .. .	Practice, 1
Whitehead v. Price, 2 C., M. & R. 417	.. .. .	Insurance, 2
Whitton v. Peacock, 2 Bing. N. C. 411	.. .. .	Covenant
Wiles v. Cooper, 5 N. & M. 276	.. .. .	Master and Servant, 1
Willis v. Bank of England, 5 N. & M. 478	.. .. .	Bank of England
Wilton v. Chambers, 5 N. & M. 430	.. .. .	Sheriff, 2
Wilson v. Northop, 4 D. P. C. 41	.. .. .	Practice, 14
Witham v. Gompertz, 2 C., M. & R. 736; 1 Tyr. & G. 6; 4 D. P. C. 382		Affidavit to hold to Bail
Wright v. Skinner, 2 C., M. & R. 746; 1 Tyr. & G. 69	.. .. .	Writ of Trial Act, 3
——— v. Woodgate, 2 C., M. & R. 573; 1 Tyr. & G. 12	.. .. .	Libel, 2

EQUITY.

Amsdell v. Whitfield, Sim. 356	..	..	..	..	Practice, 4
Armstrong v. Armstrong, M. & K. 45, 52	..	..	..	..	Partnership, 3
Ashley v. Ashley, Sim. 358	..	..	..	..	Will, 9; Practice, 1
Ashton v. Milne, Sim. 369	..	..	..	..	Mortgage, 1
Attorney-General v. Brazennoze College, Bl. 377	..	..	..	..	Charity, 2
———— v. Hungerford, Bl. 437	..	..	..	..	Charity, 1
———— v. Shore, Sim. 460	..	..	..	..	Practice, 14
Barker, in the matter of, Sim. 476	..	..	..	..	Solicitor and Client
Bates v. Bonnor, Sim. 380	..	..	..	..	Practice, 13
Bridge v. Bridge, Sim. 352	..	..	..	..	Practice, 2
Brodie v. Bolton, M. & K. 168	..	..	..	..	Costs
Bulmer v. Joy, M. & K. 197	..	..	..	..	Executors and Administrators
Burnell v. Duke of Wellington, Sim. 461	..	..	..	..	Practice, 17
Child v. Giblett, M. & K. 71	..	..	..	..	Will, 5
Clifton v. Cockburn, M. & K. 76	..	..	..	..	Settlement
Davis v. Thornycroft, Sim. 420	..	..	..	..	Separate Use
Desanges v. Gregory, Sim. 473	..	..	..	..	Practice, 15
Fortescue v. Bennett, M. & K. 36	..	..	..	..	Voluntary Deed
Gardner v. Scott, Sim. 407	..	..	..	..	Bankrupt
Giors v. Hicks, Sim. 400	..	..	..	..	Mortgage, 3
Goodall v. Pickford, Sim. 379	..	..	..	..	Practice, 12
Graves v. Hicks, Sim. 391	..	..	..	..	Will, 1, 2, 3
Hartley v. Hewitt, M. & K. 28	..	..	..	..	Pleading, 1
Houlditch v. Donegal, Bl. 301	..	..	..	..	Jurisdiction
Hunter v. —, Sim. 429	..	..	..	..	Practice, 18
———— v. Atkins, M. & K. 139	..	..	..	..	Agent
James v. Herriott, Sim. 428	..	..	..	..	Pleading, 3
Jeyes v. Foreman, Sim. 384	..	..	..	..	Practice, 3
Johnson v. Kennett, Sim. 384	..	..	..	..	Purchaser
Joslin v. Hammond, M. & K. 110	..	..	..	..	Will, 4
Kemble v. Kean, Sim. 333	..	..	..	..	Injunction, 2
Kimberley v. Jennings, Sim. 340	..	..	..	..	Injunction, 3

Lancaster v. Lancaster, Sim. 413	.. .. .	Practice, 19
Latter v. Dashwood, Sim. 462	.. .. .	Mortgage, 2
Lee v. Ravenscroft, Sim. 474	.. .. .	Practice, 10
Le Jeune v. Budd, Sim. 441	.. .. .	Marriage
Lewis v. Armstrong, M. & K. 69.	.. .. .	Practice, 5
Lovegrove v. Nelson, M. & K. 1	.. .. .	Partnership, 1, 2
Lowndes v. Davies, Sim. 408	.. .. .	Pleading, 3
Manning v. Thesiger, M. & K. 99	.. .. .	Legacy, 1
Moore v. Langford, M. & K. 323; Sim. 325	.. .. .	Practice, 8, 11
Mortara v. Hall, Sim. 465	.. .. .	Infant
Mousley v. Carr, M. & K. 205	.. .. .	Practice, 16
Mytton v. Boodle, Sim. 451	.. .. .	Practice, 7
Newell v. Townsend, Sim. 419	.. .. .	Debtor and Creditor
Piper v. Piper, M. & K. 159	.. .. .	Power
Portarlington (Lord) v. Soulby, M. & K. 104; Sim. 336	.. .. .	Injunction, 1; Pleading, 5
Rattenbury v. Fenton, Sim. 368	.. .. .	Practice, 2
Ripon (Earl of) v. Hobart, M. & K. 169	.. .. .	Injunction, 4
Robinson v. Alexander, Bl. 352	.. .. .	Statute of Limitations
Rogers v. Rogers, Sim. 364	.. .. .	Legacy, 2
Russell v. Dight, Sim. 430	.. .. .	Practice, 7
Thompson v. Brown, M. & K. 32	.. .. .	Legacy, 3
Tytherleigh v. Harbin, Sim. 329	.. .. .	Will, 8
Walton v. Merry, Sim. 328	.. .. .	Practice, 9
Waterton v. Croft, Sim. 431	.. .. .	Pleading, 4
Weaving v. Count, Sim. 439	.. .. .	Insolvent
Weiss v. Dell, M. & K. 26	.. .. .	Executor, 1, 2
Woodstock v. Shillito, Sim. 416	.. .. .	Will, 6

BANKRUPTCY.

Alexander, Exp., M. & A. 492	..	..	..	..	..	Assignees, 4
Annandale, Exp., D. & C. 511	..	..	..	..	..	Annuity
Anonymous, Dea. 106	..	+	..	..	..	Official Assignee, 1
Bell, Exp., D. & C. 481	..	..	..	..	..	Fiat, 5
Benecke, Exp., D. & C. 186	..	..	..	..	..	Agreement, 1
Berkeley, Exp., D. & C. 572	..	..	..	..	..	Equitable Mortgagee
Birkett, Exp., D. & C. 503	..	..	..	..	..	Committal, 2
Blake, Exp., M. & A. 481	..	..	..	..	..	Fiat, 8
Borrodaile, Exp., M. & A. 398	..	..	..	..	..	Slaves
Bradstick, Exp., M. & A. 490	..	..	..	..	..	Arrangement
Buckley, In the matter of, D. & C. 504	..	..	..	..	..	Certificate, 3
Burdekin, Exp., Dea. 57	..	..	..	..	..	Fiat, 4
Burn, Exp., M. & A. 483	..	..	..	..	..	Certificate, 2
Cattoral, Exp., Dea. 193	..	..	..	..	..	Assignees, 2
Chambers, Exp., M. & A. 446	..	..	..	..	..	Acquiescence
——— In the matter of, D. & C. 578	..	..	..	..	..	Fiat, 2
Collier, Exp., D. & C. 520	..	..	..	..	..	Wages
Crosbie, Exp., M. & A. 393	..	..	..	..	..	Composition, 4
Crossley, Exp., Dea. 107	..	..	..	..	..	Composition, 1; Evidence
Davies, Exp., Dea. 115	..	..	..	..	..	Proof, 1
Dickson, Exp., D. & C. 614	..	..	..	..	..	Set-off
Dugard, Exp., D. & C. 521, 524	..	..	..	..	..	Vivà voce Examination, 2, 3
Ellis, Exp., M. & A. 370	..	..	..	..	..	Composition, 3
Ellison, Exp., M. & A. 365	..	..	..	..	..	Reputed Ownership, 5
Exp. ———, in the matter of Maberly, Dea. 75	..	..	..	..	..	Appeal
Forth, Exp., M. & A. 381	..	..	..	..	..	Petitioning Creditor
Gerrish, In the matter of, M. & A. 491	..	..	..	..	..	Docket
Gould, Exp., D. & C. 547	..	..	..	..	..	Partner, 3
Grey, In the matter of, Dea. 105	..	..	..	..	..	Costs, 3
Groom, Exp., D. & C. 640	..	..	..	..	..	Commissioner, 1
Hall, Exp., D. & C. 530; Dea. 171; M. & A. 392	..	..	..	..	..	Allowance; Composition, 2; Sequestrator

Handly, Exp., D. & C. 508, 572	..	..	..	Costs, 5; Petition, 6
Hanks, Exp., M. & A. 383	..	..	..	Petition, 3, 5
Hanley, Exp., M. & A. 426	..	..	..	Agreement, 2
Hare, Exp., M. & A. 478	..	..	..	Reputed Ownership, 4
Harland, Exp., Dea. 75	..	..	..	Fiat, 6
Hartley, Exp., D. & C. 496	..	..	..	Marshalling
Hawker, In the matter of, D. & C. 569	..	..	..	Commission, 3
Hewitt, Exp., M. & A. 477	..	..	..	Assignees, 3
Hill, Exp., Dea. 123	..	..	..	Partners, 2
Hinton, Exp., M. & A. 361	..	..	..	Supersedes, 1
Hunt, Exp., D. & C. 503	..	..	..	Attachment; Committal, 1
Hutchinson, Exp., D. & C. 530	..	..	..	Solicitor, 4
Humphrey, In the matter of, D. & C. 484	..	..	..	Fiat, 1
Jones, Exp., D. & C. 536	..	..	..	Jurisdiction, 1
King, Exp., Dea. 143	..	..	..	Trust
Laing, Exp., M. & A. 38	..	..	..	Solicitor, 2
Lavender, Exp., M. & A. 484, 485; D. & C. 437, 486, 496, 497	..	..	..	Act of Bankruptcy; Procedendo; Rehearing; Supersedes, 2; Witness
Leaf, Exp., Dea. 176	..	..	..	Proof, 3
Liddiard, Exp., D. & C. 603	..	..	..	Proof, 4
Mark, In the matter of, D. & C. 482	..	..	..	Solicitor, 5
Millington, Exp., Dea. 14	..	..	..	Costs, 6
Myers, Exp., D. & C. 579	..	..	..	Committal, 3
Neirincks, Exp., M. & A. 384	..	..	..	Builder
Nunn, Exp., M. & A. 403	..	..	..	Petition 1
Ord, Exp., Dea. 166	..	..	..	Reputed Ownership, 2
Parr, Exp., Dea. 77	..	..	..	Fiat, 3
Perring, Exp., M. & A. 486	..	..	..	Certificate, 1; Petition, 10
Prater, Exp., M. & A. 364	..	..	..	Assignees, 5
Read, Exp., D. & C. 525	..	..	..	Proof, 5
Renshaw, Exp., D. & C. 483	..	..	..	Unclaimed Dividends
Robinson, Exp., D. & C. 499	..	..	..	Partners, 1; Petition, 9, 11
Rogers, Exp., D. & C. 637, 638	..	..	..	Costs, 1; Surety
Smith, Exp., D. & C. 579; M. & A. 382	..	..	..	Bankrupt, 2; Reputed Ownership
Soper, Exp., D. & C. 569	..	..	..	Proof, 2
Stevens, Exp., M. & A. 482	..	..	..	Petition, 4
Stokes, In the matter of, D. & C. 578	..	..	..	Jurisdiction, 2
Stone, Exp., M. & A. 503	..	..	..	Costs, 7

Stovey, Exp., D. & C. 504 Assignees, 1; Petition, 8; Solicitor, 3
 Sutton, In the matter of, Dea. 43 Fiat, 7

Telford, Exp., M. & A. 389 Petition, 7
 Thompson, Exp., D. & C. 634; Dea. 90 .. Bankrupt, 1; Wife of Bankrupt, 12
 Topham, Exp., M. & A. 484 Official Assignee, 2
 Towne, Exp., D. & C. 519 Solicitor, 1

Waithman, Exp., M. & A. 364 Reputed Ownership, 3
 Ward, Exp., M. & A. 391 Petition, 2; Commissioner, 2
 Wells, Exp., Dea. 69 Costs, 2

ABSTRACT OF PUBLIC GENERAL STATUTES.

(6 WILLIAM IV.)

CAP. 1.—An Act to apply certain Sums to the Service of the year one thousand eight hundred and thirty-six—seven. [4th March, 1836.]

CAP. 2.—An Act for raising the Sum of fifteen millions by Exchequer Bills, for the Service of the year one thousand eight hundred and thirty-six—seven. [4th March, 1836.]

CAP. 3.—An Act for vesting the office of Constable of the Castle of Saint Briavel's in the first Commissioner of his Majesty's Woods, Forests, Land Revenues, Works, and Buildings; and for vesting the office of Keeper of the Forest of Dean, in the county of Gloucester, in the Commissioners of his Majesty's Woods, Forests, Land Revenues, Works, and Buildings. [4th March, 1836.]

CAP. 4.—An Act to amend an Act of the last Session for abolishing Capital Punishments in cases of Letter-stealing and Sacrilege. [18th March, 1836.]

Persons convicted of any of the offences mentioned in the 5 & 6 Will. 4, c. 81, may be sentenced, at the discretion of the judge, to transportation for life, or not less than seven years, or to imprisonment for not more than three years.

CAP. 5.—An Act for carrying into further execution two Acts of his present Majesty, relating to the Compensation for Slaves upon the Abolition of Slavery, and for facilitating the distribution and payment of such compensation. [18th March, 1836.]

CAP. 6.—An Act for carrying into effect a Treaty made between his Majesty and the Queen Regent of Spain, for the abolition of the Slave Trade. [30th March, 1836.]

CAP. 7.—An Act to indemnify such persons in the United Kingdom, as have omitted to qualify themselves for offices and employments, and for extending the time limited for those purposes respectively until the 25th day of March, 1837; to permit such persons in Great Britain as have omitted to make and file affidavits of the execution of indentures of clerks to attornies and solicitors to make and file the same on or before the first day of Hilary Term, 1837; and to allow persons to make and file such affidavits, although the persons whom they served shall have neglected to take out their annual certificates. [30th March, 1836.]

REGULÆ GENERALES.

HILARY TERM, 6 WILL. IV.

EXAMINATION AND RE-ADMISSION OF ATTORNEYS.

1st. WHEREAS, by the statute 4 Hen. IV. c. 18, it was enacted, "that all the attorneys shall be examined by the justices, and by their discretions their names put on the roll, and they that be good and vertuous, and of good fame, shall be received, and sworn well and truly to serve in their offices." And whereas by the statute 3 Jac. I. c. 7, s. 2, it was enacted, "that none shall from henceforth be admitted attorneys in any of the king's Courts of Record, but such as have been brought up in the same Courts, or otherwise well practised in soliciting of causes, and have been found by their dealings to be skilful and of honest disposition; and that none be suffered to solicit any cause or causes in any of the Courts aforesaid, but only such as are known to be men of sufficient and honest disposition." And whereas, by a rule made in Michaelmas Term, 1654, in the Courts of King's Bench and Common Pleas, it was ordered, "that the Courts should once in every year in Michaelmas Term, nominate twelve or more able and credible practisers, to continue for the ensuing year to examine such persons as should desire to be admitted attorneys, and appoint convenient times and places for the examination; and the persons desiring to be admitted were first to attend with their proofs of service, then to repair to the persons appointed to examine, and being approved, to be presented to the Court and sworn." And whereas, by the statute 2 Geo. II. c. 23, s. 2, it was enacted, "that the judges or any one or more of them, should, and they were thereby authorized and required, before they should admit such person to take the oath, to examine and inquire by such ways and means as they should think proper, touching his fitness and capacity to act as an attorney; and if such judge or judges respectively should be thereby satisfied that such person is duly qualified to be admitted to act as an attorney, then and not otherwise, the said judge or judges of the said Courts respectively should, and they were thereby authorized to administer to such persons the oath thereafter directed to be taken by attorneys: and after such oath taken, to cause him to be admitted an attorney of such Court respectively." And whereas, in order to carry the last-mentioned statute more fully into effect, it is expedient annually to appoint examiners, subject to the control of the judges, in manner hereinafter mentioned:

It is ordered, that the several masters and prothonotaries for the time being, of the Courts of King's Bench, Common Pleas, or Exchequer respectively, together with twelve attorneys or solicitors, be appointed by a rule of Court in Easter Term in every year, to be examiners for one year; any five of whom, one whereof to be one of the said masters or prothonotaries, shall be competent to conduct the examination; and that from and after the last

day of next Easter Term, subject to such appeal as hereafter mentioned, no person shall be admitted to be sworn an attorney of any of the Courts, except on production of a certificate signed by the major part of such examiners, actually present at and conducting his examination, testifying his fitness and capacity to act as an attorney; such certificate to be in force only to the end of the term next following the date thereof, unless such time shall be specially extended by the order of a judge.

2nd. It is further ordered, that the examiners so to be appointed shall conduct the said examinations under regulations to be first submitted to and approved by the judges.

3d. And it is further ordered, that in case any person shall be dissatisfied with the refusal of the examiners to grant such certificate, he shall be at liberty to apply for admission by petition in writing to the judges, to be delivered to the clerk of the Lord Chief Justice of the Court of King's Bench, upon which no fee or gratuity shall be received; which application shall be heard in Serjeants' Inn Hall, by not less than three of the judges.

4th. And whereas the hall or building of the Incorporated Law Society of the United Kingdom, in Chancery Lane, will be a fit and convenient place for holding the said examination, and the said society have consented to allow the same to be used for that purpose: It is further ordered, that, until further order, such examinations be there held, on such days, being within the last ten days of every term, as the said examiners or any five of them shall appoint; and that any person not previously admitted an attorney of any of the three courts, and desirous of being admitted, shall, in addition to the notices already required, give a term's notice to the said examiners of his intention to apply for examination, by leaving the same with the secretary of the said society, at their said hall, which notice shall also state his place or places of residence or service for the last preceding twelve months; and in case of application to be admitted on a refusal of the certificate, shall give ten days' notice, to be served in like manner, of the day appointed for hearing the same.

5th. And it is further ordered, that three days at the least before the commencement of the term next preceding that in which any person not before admitted, shall propose to be admitted an attorney of either of the Courts, he shall cause to be delivered at the master's or prothonotary's office, as the case may be, instead of affixing the same on the walls of the Courts as now required, the usual written notices, which shall state, in addition to the particulars now required, his place or places of abode or service for the last preceding twelve months; and the master or prothonotary, as the case may be, shall reduce all such notices as in this rule first mentioned, into an alphabetical table or tables, under convenient heads, and affix the same on the first day of term in some conspicuous place within or near to, and on the outside of each Court.

6th. And whereas it is expedient that, upon the re-admission of attorneys, the judges should have further means of inquiring as to the circumstances under which persons applying to be re-admitted discontinue to practise, and as to their conduct and employment during the time of such discontinuance; It is further ordered, that at the time of giving the usual notice of the inten-

tion to apply for such re-admission, the party shall cause to be filed the affidavit on which he seeks to be re-admitted, with the master or prothonotary, as the case may be, which affidavit shall contain, in addition to the particulars now required, a statement of his place or places of abode during the last preceding year; and such person shall also at the same time cause to be left a copy of such affidavit with the clerk of the Lord Chief Justice of the Court of King's Bench. And the rule for the re-admission of such person shall be drawn up on reading such affidavit, and also an affidavit of such copy having been left in compliance with this rule.

(Signed by all the Judges.)

It is ordered that the several Masters and Prothonotaries for the time being of the Courts of King's Bench, Common Pleas, and Exchequer respectively, together with

Thomas Adlington,
Jonathan Brundrett,
George Frere,
James William Freshfield,
James Hall,
Bryan Holme,

William Lowe,
Edward Rowland Pickering,
Samuel White Sweet,
William Tooke,
Richard White,
Edward Archer Wilde,

Gentlemen, attorneys, be, and the same are hereby appointed, examiners for one year now next ensuing, to examine all such persons as shall desire to be admitted attorneys of all or either of the said Courts from and after the last day of this present term; and that any five of the said examiners, one of them being one of the said masters or prothonotaries, shall be competent to conduct the said examination, in pursuance of and subject to the provisions of the rule of all the said Courts made in this behalf in Hilary Term last past.

(Signed by all the Judges.)

HOLIDAYS AT THE LAW OFFICES.

WHEREAS, by the Act of the 3 & 4 Will. IV. c. 42, s. 43, it is enacted, that none of the several days mentioned in the statute passed in the sessions of Parliament holden in the 5th and 6th year of the reign of King Edward the Sixth, intituled, "An Act for keeping Holidays and Fasting Days," shall be observed or kept in the Courts of Common Law, or in the several offices belonging thereto, except Sundays, the day of the Nativity of our Lord, and the three following days, and Monday and Tuesday in Easter week, It is hereby ordered, that henceforth, in addition to the said days, the following and none other shall be observed or kept as holidays in the several offices belonging to the said Courts; viz. Good Friday and Easter Eve, and such of the five days following as may not fall in the time of Term, but not otherwise:—the birthday of our lord the King, the birthday of our lady the Queen, the day of the accession of our lord the King, Whit Monday and Whit Tuesday.

(Signed by all the Judges.)

BIOGRAPHICAL NOTICE OF THE LATE HENRY ROSCOE, ESQ.

WE record with sincere regret the early death of one of the most diligent and promising, as he was also one of the most honourable and estimable, members of our bar. The name of Mr. Roscoe was familiar to the whole profession, as the author of some of our most useful legal *hand-books*. Amongst his personal acquaintance, the strict truth and honour of his character, the amiableness of his temper, and the playfulness of his humour, combined to render him the subject of esteem and regard, as universal as it was just.

He was the youngest son of the late William Roscoe, Esq. of Liverpool, the historian of Leo and the Medici, and was born in the year 1799. He was not educated at any school; he had for a short period a classical master, but his knowledge was principally acquired by self-instruction. From his earliest youth, his studies were prosecuted with a cheerful assiduity; and an especial devotion to the acquisition of classical learning; and the more elegant branches of modern literature. The failure of his father, in 1816, interposed a temporary obstacle in the way of his early destination to the bar, and he was placed in an attorney's office at Liverpool, where he remained for some years, no less diligently labouring to possess himself of professional knowledge, especially in the more recondite department of Real Property Law, in which his first legal publication showed him to have attained a proficiency unfrequent in lawyers of a much more advanced standing. Subsequently, however, he resumed his original purpose, and was entered of the Inner Temple; and in Hilary Term, 1826, he was called to the bar by that society. His course of legal authorship had already begun. In 1825 he obtained considerable repute by the publication of an elaborate work on the Law of Actions relating to Real Property, in two large volumes, 8vo. which will probably continue to be referred to as the best connected exposition of the doctrines governing real actions—a branch of the law, however, much of which the recent reforms have gone far to render obsolete. In the same year he published (in conjunction, we believe, with his brother,) a compilation, in three small volumes, entitled “Westminster Hall;” an amusing repertory of anecdotes relating to law and lawyers, culled from various historical and legal works: and superintended also a new edition of Roger North's gossiping *Lives of Lord Guildford and his Brothers*. In 1828 appeared the first edition of his “*Digest of the Law of Evidence on Trials at Nisi Prius*”—of which a fourth is now on the eve of publication; a manual so universally in the hands of the profession, and the subject of such continual reference in chambers and on the circuit, that to state its merits would be altogether superfluous. In the following year appeared another hardly less useful or popular product of his industry,—the “*Digest of the Law of Bills of Exchange, &c.*” which also has passed through several large impressions.¹ In 1830 he contributed to Lardner's *Cyclopædia* a volume of “*Lives of Eminent British Lawyers*,” a creditable and correct performance, but to which higher praise per-

¹ In the last edition were introduced notes of many cases from the American Reports, relating to the law of bills and notes.

haps can hardly be ascribed. For some years after this period he was employed, under the superintendence of Mr. Gregson, in the preparation of Parliamentary Bills for the government, in which capacity he was a coadjutor in the framing of the two Reform Bills. In 1833, he undertook the editorship of the "*Jurist*," to which he had previously been a contributor; the work survived, however, only through a single number more. He produced, about the same time, a *Life* (in two vols. 8vo.) of his Father, whose venerable and respected age had been terminated a few months before; a modest and pleasing work, very favourably noticed in the *Edinburgh Review* (No. 117). In the following year he was appointed one of the members of the Corporation Commission, and as such visited and reported on many boroughs, in different parts of the country. In the spring of 1835, he joined Messrs. Crompton and Meeson in the task of reporting in the Exchequer: an employment which some men would find in itself well nigh sufficient to engage their whole attention, or at least to divert them from any other continuous course of legal composition. But the increasing demands upon his labour only stimulated him—unhappily to the serious injury of his health—to augmented exertions. In this same year (1835) he published his "*Digest of the Law of Evidence in Criminal Cases*," a well-arranged and valuable companion to his compendium of Civil Evidence. Besides these various testimonies to his diligence, he compiled, both in the last and the present year, a "*Digest of the Law*," (that is, a digested index of the cases decided in the several Courts), for each of the years 1834 and 1835—a task in itself of no trifling labour. In the summer of the latter year, he was at length reluctantly persuaded by his medical attendants, in consequence of the increased weakness produced by a disease he had for some time been labouring under, and which had doubtless been aggravated by the severity of his mental labours (diabetes), to renounce altogether his engagements in London, and try what country air and comparative leisure might effect in his favour. He had a short time before been appointed by the corporation of Liverpool to preside in the Mayor's Court there, (a Court of limited civil jurisdiction,) and discharged the duties of the office with much credit and efficiency: and he now retired to a quiet residence in the neighbourhood of that town, and within the circle of almost all his dearest connexions. But his constitution was too much broken to rally; his strength continued to decline, and he could not even yet be induced to abstain from literary labour much too close and trying for his enfeebled frame. Until within a very short period of his death, he was busily engaged in the revision of the forthcoming edition of his *Treatise on Evidence*, and in the prosecution of a more extended work, a "*Digest of Nisi Prius Law*," which he had some time since undertaken in conjunction with Mr. Smirke, and which we trust that gentleman, whose qualifications as a sound and accurate lawyer eminently qualify him for the task, will soon find leisure to complete for publication, and so to correct the inaccuracies and supply the omissions of former works of the same kind. Mr. Roscoe published also, in January last, a tract "*On Pleading the General Issue since the New Rules*," the first of a projected series of short treatises on legal subjects of present interest. Besides the separate works we have enumerated, he was the author also of many pleasing poetical attempts, contributed to various periodical and other publications.

His religious opinions were of the Unitarian creed; his political principles Whig, or perhaps "more than Whig," as he was designated, along with most of his brother commissioners, by Lord Lyndhurst; but without the least tincture of bitterness against those of opposite opinions either in politics or religion. Very many were the friends whom his character and manners conciliated, and we

believe it may be alleged of him, without a shade of exaggeration, that he never made an enemy. For ourselves, whose acquaintanceship, during a great part of his professional life, has lain in nearly the same legal circle, we can safely aver that we never heard word breathed of him save in the spirit of kindness and esteem.

Mr. Roscoe married, in 1831, Maria, the second daughter of Thomas Fletcher, Esq., of Liverpool, who survives him, and by whom he left two children, a boy and a girl. He died on the 25th of March last, in the 37th year of his age, having supported with cheerful and pious submission a lingering and long since hopeless illness.

THE BILLS FOR THE AMENDMENT OF THE LAW OF WILLS, OF EXECUTORS AND ADMINISTRATORS, AND OF DEEDS.

MR. TYRRELL'S important Bills for amending the laws relating to Wills and Executors and Administrators and Deeds, have been brought into the House of Lords, and it is thought probable that they will pass this session. They are drawn with remarkable clearness, fulness, and precision, and few bills have been more fully considered and discussed. They were introduced and passed through Select Committees of the House Commons in 1834. In 1835, the Wills and Executors Bills were again brought in and received great consideration in a numerous Select Committee of the House of Commons, including all the lawyers in the House, which sat during four days, and discussed every clause in them, and they were afterwards referred to a Select Committee of the House of Lords. During the progress of the Bills, several hundred printed copies have been distributed among the profession by Mr. Tyrrell, and Lord Langdale has lately sent copies of them to several of the most eminent conveyancers and other members of the bar. The provisions of the Bills have, therefore, been extensively canvassed and are generally known. The Bills relating to Wills and Executors and Administrators are intended to carry into effect the amendments proposed by the Real Property Commissioners in their Fourth Report, which is well known to have been drawn by Mr. Tyrrell. The second section repeals all the existing statutes relating to Wills, so that the proposed act will be the only written law on the subject. Section 3, and following clauses, give a power of testamentary disposition over every description of property which a testator may be entitled to at the time of his death, some kinds of which, such as some customary freeholds, some copyholds before admittance, rights of entry, and real estate acquired after the execution of the Will, cannot be devised by the existing law. Section 13 provides that no Will shall be made by any person under the age of 21 years. Section 15, and the following clauses, provide a uniform mode of execution for Wills of every description. They are to be signed at the end to show that they are not imperfect papers; two witnesses are required, and some of the inconvenient requisites of the statute of frauds are omitted. Sections 24 to 29, relate to the revocation of Wills. Section 32, and other clauses, alter some of the rules of construction where the Courts have given to words used by ignorant testators a technical meaning contrary to their usual signification, and where great doubt and litigation are occasioned by the numerous exceptions which subsequent judges have let in for the purpose of evading such unjust rules. Sections 37 and 38 prevent some cases of lapse which are

obviously contrary to the intention; and Sections 39 and 40 are intended to diminish the expense of proceedings respecting Wills, as regards real estate, where they are the subject of litigation in Courts of Equity. The provisions respecting which there is the most difference of opinion are Section 15, which deprives a person, under the age of 21 years, of the power of making a Will, even of personal estate; and Section 24, which makes the marriage of a man an absolute revocation of his Will. It was determined by the Committee of the House of Commons in 1885, that power should be given to make a Will at the age of 17 years, but the age of 21 was substituted for that of 17 in a subsequent stage of the Bill. The provision that a man's Will should be revoked by marriage, is understood to have been settled as a compromise between the members of different opinions in the committee. It appears to have been agreed that the present law, which presumes an intention that a Will should be revoked by marriage, and the birth of a child, and in some cases as to personal estate, by the subsequent birth of children only, or other circumstances, must be altered for the reasons stated in the Fourth Report of the Real Property Commissioners, pp. 28, 29, and 32, and that no revocation should depend upon conjecture of what might be the intention. The Real Property Commissioners appear to have thought that where the law entrusted a testator with the power of making a Will, it should impose upon him the duty of revoking it when necessary. It is said to have been the opinion of the Committee, that marriage occasioned in almost every case so great a change of circumstances, that there was less danger in making it an absolute revocation, than in allowing Wills made previously to it to remain in force. The Bill respecting Executors and Administrators, among other useful provisions, allows an executor to prove the Will of his own testator, and at the same time renounce the executorship of other persons of whom his testator may have been the executor, and enables executors to get discharged from the office.

The principal object of the Bill respecting Deeds, is to supply the want of a means of transferring contingent interests in real estate; for since the abolition of fines, there is no legal mode of passing them. It also contains provisions for rendering unnecessary a lease for a year, and for preventing the destruction of contingent remainders and consequently the necessity of any machinery for preserving them, and for enabling several transactions to be effected by one simple deed, which now require two, and among other important amendments, it prevents a condition not to assign a lease without consent from being void as soon as one consent is given.

The Bills respecting Wills, and Executors and Administrators, were brought into the House of Commons by the present Attorney-General, and the Bill respecting Deeds by Mr. Philpotts, the late member for Gloucester. The Bill respecting Wills has been introduced in the House of Lords by Lord Langdale. Lord Lyndhurst has taken charge of the other two Bills.

EVENTS OF THE QUARTER.

WE are obliged to go to press without any definite information as to the Chancellor's intended bill for the reform of his Court or the division of his office. The secret has been so inviolably kept, that many are induced to doubt whether his intentions are yet known to himself, though having given notice for the 28th, he can hardly be otherwise than prepared. As the plan will probably be before the public before this number appears, we shall only notice one rumour concerning it, and even that may soon be refuted by facts. We hear that Lord Langdale takes no part in concocting it, though it is said he entered the House of Lords on the express understanding that his co-operation would be required in law measures exclusively, considering it unbecoming in a judge to take a prominent part in politics.

The death of Mr. Trower has placed a mastership at the disposal of the ministry, a little, it appears, to their embarrassment. Lord Brougham says, that, immediately on finding the Court of Review a failure, he resolved on turning the judges into masters of Chancery, so as to dispense with the necessity of pensioning them, and he has called upon the government to act upon this plan by nominating Sir George Rose (and it would be difficult to make a better nomination) to the vacancy. Some leading members of the government on the other hand are anxious to appoint Mr. Senior, in which case they would also have the gratification of coinciding with Lord Brougham, who used to contend that a conveyancing master was absolutely necessary to insure the proper working of the Equity Courts. Mr. Senior has high claims on the country for a series of important services gratuitously performed, and his professional merits are universally allowed.

The new rules relating to the Examination of Attorneys are given, *ante*, p. 492. The judges have since appointed the several Masters and Prothonotaries of the three Courts, together with twelve of the Committee of Management of the Incorporated Law Society, to be the Examiners for one year, five examiners to be competent to conduct such examination, one of such five being a Master or Prothonotary.

The proposed regulations for the mode and course of examination have, we learn, been prepared by the Examiners, subject to the approval and sanction of the Judges, to whose consideration they have been already referred. It is supposed that the Examiners will in the first place require, that, within a certain portion of each term, the original articles and all assignments of clerks applying to be admitted, shall be left with the Secretary of the Incorporated Law Society, with a certificate of general good conduct, and of faithful and diligent professional service during the whole period of the articles, specifying all occasional absences and the aggregate amount of them, with power, if thought fit, to call upon the master or clerk, both or either, for explanations in writing of such certificates of conduct and service. With the view of ascertaining the fitness and capacity of the clerk, it is understood that a public examination will take place, in the Great Hall of the Law Society, of all Clerks applying to be admitted, when printed questions will be proposed touching their knowledge of the law and the practice of the Courts, answers to which will be required on the spot, without any previous intimation of the nature of the questions or any liberty of reference. The Examiners will grant or withhold

their fiat according to the sufficiency of the answers, and arrange the names of the persons admitted in classes, according to the plan pursued at the Universities.

A petition has been presented, and petitions are said to be getting up, for the repeal or reduction of the duty on Attorneys' Certificates, but, from what has fallen from the Chancellor of the Exchequer, we conceive with little prospect of success.

Another petition, in the prayer of which not merely all classes of lawyers but all classes of the public are interested, was lately presented by Mr. Tooke, whose zeal, character, and well-earned influence in the House insure a prompt attention to any representations he may make on the part of the profession. We allude to the petition for the removal of the Courts of Law from Westminster, which is in all respects a very inconvenient site for them, to say nothing of the faulty construction of the existing Courts themselves.

A Committee has been named to review the proceedings of the Record Commission, on the motion of Mr. Charles Buller, whose speech on the occasion carried the fullest conviction of its necessity. The inquiry is expected to end in the superseding of the existing Commission, the powers of which have been strangely perverted from the purposes for which they were conferred.

No Local Court Bill is to be brought in as a Government measure during the present session, and we have our doubts whether the Imprisonment for Debt Bill will pass. For the third time we warn members to look at its real scope, which extends far beyond what the title would indicate.

A Bill for improving the Registration of Voters has been introduced, but after the ample consideration bestowed on the subject in our last number, perhaps our readers will not be sorry that we have abstained from it in this. One amendment, however, has been made in Committee, as to the expediency of which we shall hazard a doubt. The Bill, as originally drawn, required the revising barrister to be of three years' standing at the least—the *three* is now altered into *five*, without any exception for barristers who have already learnt the duty by discharging it. But independently of the imprudence of disqualifying these, the slightest acquaintance with the constitution of the bar will suffice to show the impolicy of limiting the discretion of the judges in this manner. Barristers in good practice will not accept of the appointments at all; the judges therefore are generally compelled to choose between the younger members of the profession who are just beginning to get known,—with all their energies alive and their knowledge in readiness, and those of the senior members who have been distanced in the race or have tacitly withdrawn from competition, and are merely going the circuit as amateurs. Which of these are most likely to do the work well, is a question hardly admitting of a doubt.

Another Report from the Criminal Law Commissioners is in preparation. We understand a partial abolition of the punishment of death is to be proposed.

A Bill for the Consolidation of the Ecclesiastical Courts is at present in progress through parliament, and expected to pass.

The New Poor Law proceeds with a steady march, crushing in its way much sessions practice. It has crushed also much medical practice. And here the public will observe the different behaviour of the two professions. The reduction of the sessions practice has been from averages of forty and fifty appeals to six, five, and one. Leaders of sessions have had their incomes reduced several hundreds a year; several have been compelled to abandon the sessions altogether; a great amount of learning, the result of much labour, is at once rendered useless; yet they are aware that the change is beneficial, and, without affecting to conceal

its severity, they make no complaint. The medical men, on the contrary, who are simply prevented from charging exorbitantly for casual poor, and checked in making the parish pay their patients' bills, are banding together and forming medical trade-unions, with the view of petitioning parliament to obstruct the change and keep up their emoluments. The commissioners fix prices for their remuneration, much greater than were gained by any of them for the separate parishes; but this is not enough: they clamour for an increase: the commissioners then say that they shall fix their own prices by competition or open tender. But this satisfies them still less, and they clamour louder and louder, as if the country were about to be depopulated because the consumption of pills is to be reduced. The commissioners have compelled the attorneys, in a great number of instances, to compete for their places, and to transact, as clerks, all professional business for costs out of pocket. Yet do they murmur? Does the Law Society in London, or do any of the local societies, weary the government with their complaints or the House with their petitions? We believe it may be proved, that no profession has ever made larger sacrifices of interest for the public good, silently and unostentatiously.

In the new unions which have come into complete operation, the average reduction of expenditure has been nearly one-half. This reduction has directed attention to other branches of local expenditure, which sooner or later must undergo a general and complete revision. Sir Culling Eardley Smith, and a number of the members of the New Boards of Guardians and leading landowners in Hertfordshire, contend that the expenditure now under the control of justices at sessions should be regulated by a representative Board, consisting of delegates from the several Boards of Guardians. Mr. Hume has given notice of a more radical change; and not merely the administrative but the judicial functions of the justices at Sessions are threatened by others. The Poor Law Commissioners have of late begun to require that the clerks to the New Unions should devote their whole time to the performance of the duties of the office. Where this has been required, the older attorneys in the neighbourhood of the unions have generally refrained from becoming candidates, the salaries given being extremely low, and the duties heavy.

LIST OF NEW PUBLICATIONS.

THE Municipal Corporation Act, (5 & 6 Wm. 4, c. 76.) compared with, and corrected by the Roll, with a practical Introduction, Notes and Forms, and the cases decided upon the act. By John Frederick Archbold, Esq. Barrister at Law. In 12mo. price 6s. bds.

The Acts relating to the Administration of Law in Courts of Equity, passed the Sessions of 1 W. 4, 2 W. 4, 4 & 5 W. 4, and 5 & 6 W. 4; with an Introduction, and Notes. The Second edition. By William Thomas Jemmett, Esq., of Lincoln's Inn, Barrister at Law. In 12mo., price 7s. bds.

[For the character of this book, see 4 Law Mag. 409. The present edition contains all the subsequent cases.]

The New Bills for the Registration of Electors critically examined, with a view to the Principles on which they should be founded, and the Evils and Defects they propose to remedy. By John David Chambers, Esq., M. A., of the Inner Temple, Barrister at law. In 8vo price 2s. 6d.

[We differ in many points from the writer, but recommend his pamphlet to the attention of all who may take part in the discussion of the new bill.]

An Essay upon the Law respecting Husband and Wife; comprising more particularly a comparative view of the Law of Marriage in England, Scotland and Ireland. Second Edition. By Henry Prater, Esq., of the Middle Temple, Barrister. In 8vo., price 4s. sewed.

[We mentioned this as a work of merit on the appearance of the first edition.]

Tracts on Law, Government, and other political Subjects; being partly republications and partly original. Collected and edited by John Palmer, Gent. In 8vo. price 15s. bds.

[We fear the interest in most of the subjects discussed in this volume has passed away, but it does credit to the author's judgment and industry. Some of the anecdotes are curious.]

Reports of Cases argued and determined in the High Court of Chancery in Ireland, during the time of Lord Chancellor Sugden, from the commencement of Hilary Term 1835, to the Commencement of Easter Term 1835. By B. C. Lloyd and F. Goold, Esqrs., Barristers at Law. In royal 8vo., price 1l. 3s. bds.

[The unrivalled pre-eminence universally accorded to Sir Edward Sugden as an Equity lawyer renders it unnecessary to dwell upon the value of these Reports, assuming them to be (as we are informed they are) correct.]

A Treatise on the Law of Arbitration and Awards; including the Act of Parliament relating to Arbitrations between Masters and Workmen; with an Appendix of precedents. The Second Edition. By William Henry Watson, Esq. of Lincoln's Inn, Barrister at Law. In 8vo. price 16s. bds.

[A work of acknowledged merit.]

Elements of International Law; with a Sketch of the History of the Science. By Henry Wheaton, LL.D. In 2 vols. 8vo. price 1l. 1s. bds.

[We shall review this work in a future number.]

The Crown Circuit Companion; in which is incorporated the Crown Circuit Assistant. Tenth Edition, containing numerous Precedents, with the Statutes and Decisions down to the present time. By Archer Ryland, of Gray's Inn, Esq. Barrister at Law, price 1*l*. 1*s*. bds.

The Act for the amendment and better administration of the Laws relating to the Poor in England and Wales. Third Edition. To which is added, the Act to facilitate the Conveyance of Workhouses and other Property of Parishes, and of Incorporations or Unions of Parishes in England and Wales, with explanatory Notes, and a copious Index. By John Tidd Pratt, Esq. Barrister at Law. In 12mo. price 3*s*. sewed.

The Practical Man; or, Pocket Companion for Solicitors, Auctioneers, Estate Agents, Valuers, &c. &c. By Rolla Rouse, Solicitor, price 6*s*.

[A very useful compilation.]

Practical Suggestions and Instructions to Young Attornies and Attornies' Clerks, pointing out measures best calculated for their advantage, errors into which they may easily fall, and proper methods of practice generally, and in various departments. Written from the experience of many years' diligent employment in the general routine of business. By G. Thompson, Attorney at Law. The Second Edition. By Joseph Greaves, Attorney at Law. In 12mo. price 12*s*. bds.

[This work was reviewed in a former number (2 L. M. 84,) where our own views upon the subject, with a sketch of a course of study, will be found. The present edition is improved by references to subsequent publications, and most appropriately dedicated to Mr. Holme.]

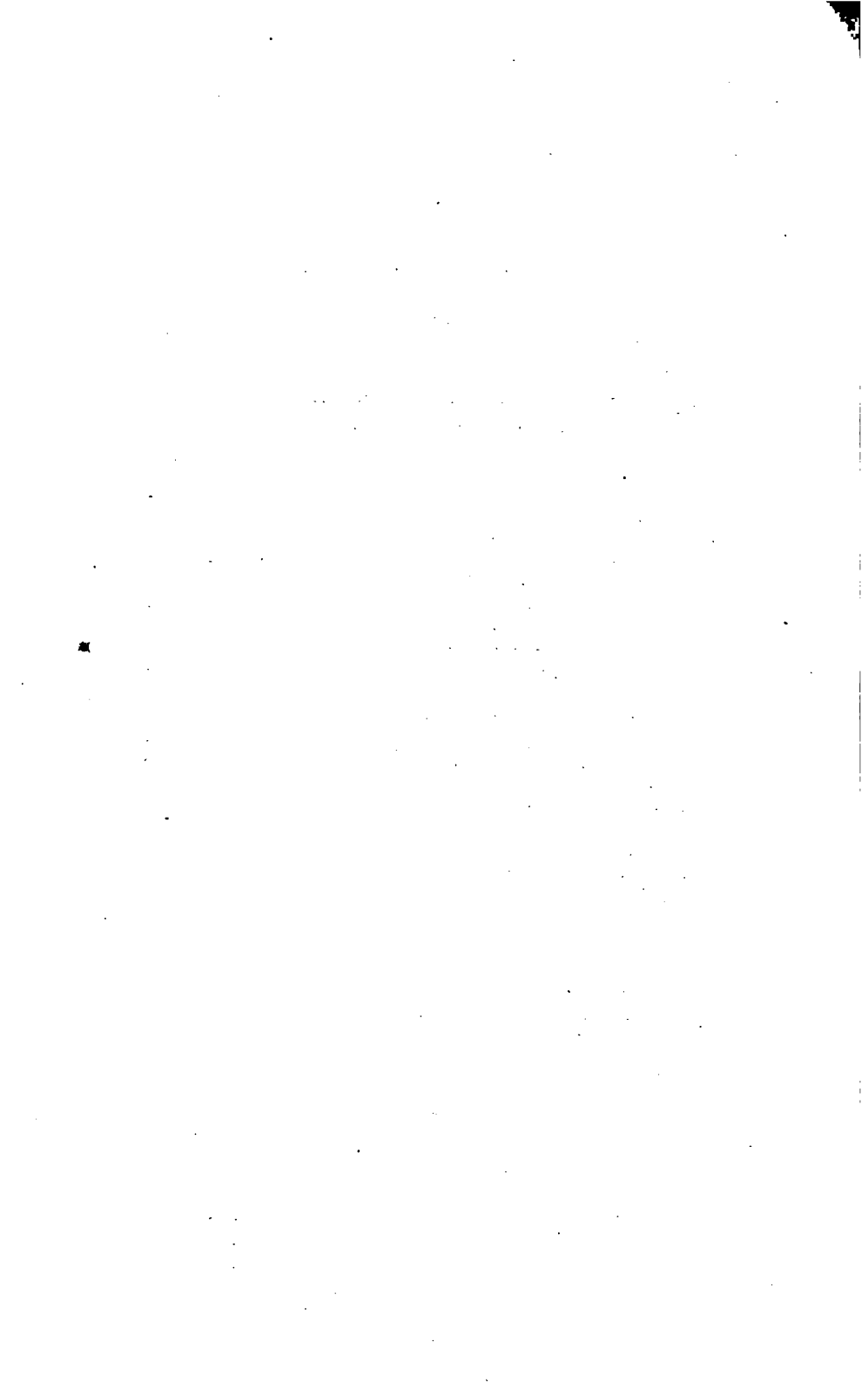
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INDEX TO VOL. XV.

A.

Attorney-General v. Shore, case of, discussed, 316. See *Hewley*.

Attornies, new rules relating to the examination of, 492.
remarks on them, 499.

B.

Bankruptcy system, table showing the operation of, 226.

Bickersteth, Mr., appointed Master of the Rolls, and created Baron Langdale, 235.

Blackstone, Sir William, Life of, 292.

his family and birth, *ib.*

his education and proficiency, 293.

his treatise on the elements of architecture, 294.

his "Farewell to his Muse," 295.

called to the bar, 296.

his continued connexion with the university, 296.

commencement of his lectures, 298.

his "Considerations in Copyholders," 299.

elected first Vinerian Professor, 300.

celebrity of his lectures, *ib.*

settles in London, *ib.*

publication of his legal tracts, *ib.*

returned to parliament, 304.

appointed Solicitor-General to the Queen, 305.

publication of the Commentaries, *ib.*

their character and merits, 306.

his speeches in Wilkes's case, 309.

raised to the bench, 310.

his advocacy of the Penitentiary system, 312.

his later literary productions, 313.

his illness and death, *ib.*

summary of his character, 314.

Brougham and Cooper Reports, the character of, 146.

C.

Calvert, Frederic, his able pamphlet on the Prisoners' Counsel Bill, 394.

Campbell, Sir John, his conduct on the recent legal appointments, 235.

Chantellorship, remarks on the proposed division of the office, 128.

Sir E. Sugden's pamphlet on, *ib.*

Chancellorship—(continued.)

mischievous results of the appointment of Commissioners, 129.

arguments in favour of the proposed change considered, 131.

arguments against it, 134.

its effect on the peerage and the bar, 139.

quotation from M. de Tocqueville on this point, *ib.*

summary of the question, 145.

Cooper, C. P., his Reports of Cases decided by Lord Brougham, character of, 146.

his preface, *ib.*

Costs in trespass to real property, operation of the new pleading rules upon, 115.

F.

Foreign juridical intelligence, 230.

recent French law books, *ib.*

French criminal procedure, defects of, 242.

G.

General Rules of the Common Law Courts, 492.

Germany and Switzerland, present state of criminal legislation and jurisprudence in, 119.

partial view of codification prevalent in Germany, 120.

new criminal codes adopted or proposed in various states, 121.

activity of legislation in Switzerland, 124.

projects of criminal codes there, *ib.*

latest theories in Germany on criminal legislation, 126.

recent works on criminal law, 127.

H.

Hewley, Lady, her charities, 316.

case of the Attorney-General v. Shore, discussed, *ib.*

terms of the trust, 318.

proceedings in the suit, 319.

grounds of the Vice-Chancellor's judgment considered, 322.

legal objections to the participation of Unitarians in the charity examined, 329.

intentions of the foundress, how far ascertainable from the deeds and appendix, 332.

or from external evidence, 337.

inquiry into the progress of Unitarianism, 339.

conclusions in favour of the defendants, 349.

L.

La Roncière, trial of, 241.

inferiority of France to England in the respect for legal forms, especially in criminal procedure, 242.

La Roncière—(continued.)

details of the case, 243 *et seq.*

evidence of the principal witnesses, 248 *et seq.*

verdict and sentence, 268.

remarks on them, *ib.*

extraordinary features of the case, 269.

curious traits of national manners disclosed on the trial, 273.

Lerminier, M., editor of *Le Droit*, his curious account of English law and lawyers, 233.

Lien, the doctrine of and authorities relating to equitable lien discussed, 60—82.

Lynch, Mr., his plan of an appellate jurisdiction, 236.

M.

Mercantile Law, series of papers on, continued, 83, 354.

Merchant Shipping, law of, (continued,) 83.

the contract of affreightment defined, 85.

the charter-party, *ib.*

freight, application of the term, 86.

various kinds of hiring under the contract of affreightment illustrated, 86.

and applied to the case of a ship, 87.

mutual relations in each case of the owner and charterer, 94 *et seq.*

obligations created by the contract, 100.

bill of lading, 101.

its form, 102.

I. the obligations relating to the *shipment*, 103.

1. as they affect the freighter, 104.

2. as they affect the owner, 112.

II. the obligations relating to the carriage and delivery, 354.

the duties of the owner as a carrier for hire, *ib.*

1. as to the preparation for the voyage, 355.

the seaworthiness and equipment of the vessel, *ib.*

2. As to the voyage itself, 360.

clearing out and sailing, *ib.*

convoy, 361.

in respect to *deviation*, 362.

resistance to hostile attacks, 363.

in case of injury from perils of the sea, 364.

on the breaking out of war, 366.

precautions as to the security of the cargo, 366.

3. As to the completion of the voyage, 367.

the discharging and delivery of the cargo, *ib.*

effect of the doctrine of stoppage in transitu, 368.

lien of the owner or master on the cargo for freight and charges, 370.

the controlling authority of the law over express covenants of charter-party, 370.

reservations of law in favour of the owner, 373.

distinctions between the liability of the *owner* and the *master*, 376.

statutory provisions on this subject, 378 *et seq.*

- Mastership in Chancery, proposed disposal of, 499.
 Mittermaier, M., paper by on criminal legislation and jurisprudence in Germany and Switzerland, 119.
 Municipal Corporation Bill, omission in, as to the barristers' remuneration, 236.

N.

- New Publications, 238, 502.

O.

- Offices, sale of, law relating to, 382.

P.

- Pepys, Sir C. C., appointed Lord Chancellor and created Baron Cottenham, 235.
 Poor Law, progress of the new, 500.
 Prisoners' Counsel Bill, observations on, 394.
 Mr. Calvert's able pamphlet on the subject, 398.

R.

- Record Commission, proceedings of, committee for reviewing, 500.
 Registration under the Reform Act, 1.
 excitement of the registration of 1835,—2.
 main sources of the dissatisfaction with the decisions of revising barristers, 3.
 different schemes of amendment, 4.
 difficulty of administering the strict provisions of the act, 9.
 difficulties of construction, 14.
 suggested plan of *agreement* amongst the barristers, 16.
 other proposed amendments in the process of revision, 17.
 and in the present system of *objection*, 21.
 how far the decision of the barrister on facts should be conclusive, 27.
 insufficiency and indefinite nature of his powers, 28.
 necessity of the adoption of some rules of agreement, 34.
 suggestions as to the appointment of revising barristers, 37.
 and the creation of a Court of Appeal, 40.
 Registration of Births, Marriages and Deaths, Lord John Russell's Bill for, discussed, 274.
 objection that the measure is useful only to dissenters, considered, 277.
 details of the bill examined, 279 *et seq.*
 differences between it and Mr. W. Brougham's bill, *ib.*
 Registration of Voters Bill, mentioned, 500.
 Revising barristers, conflicting decisions of, 3.
 suggested *agreement* among, 16.
 and as to their appointment, 37.
 See *Registration*.
 Roscoe, Henry, biographical notice of, 495.

S.

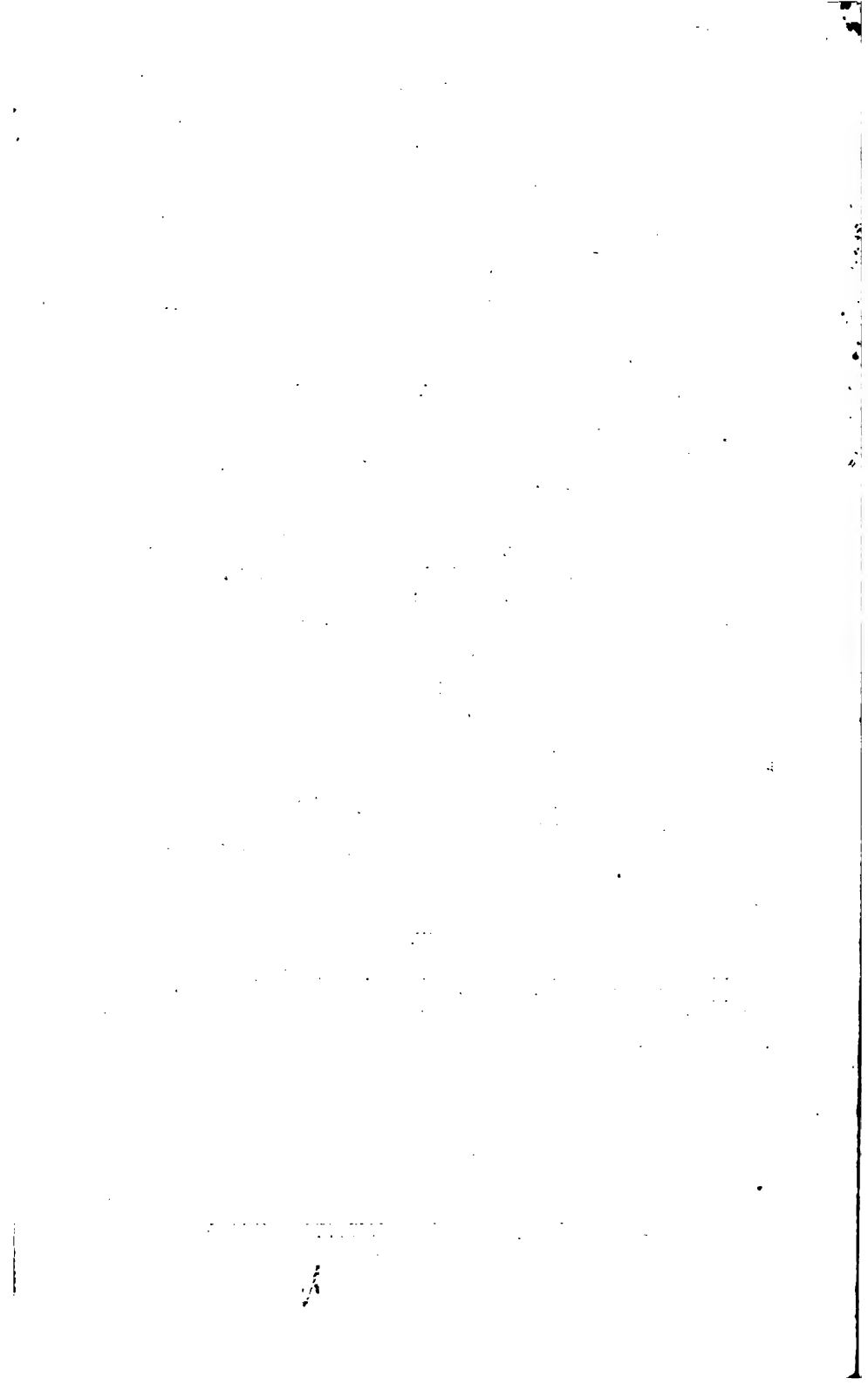
- Sale of legal offices, jurisdiction of the Courts relating to, discussed, 382 *et seq.*
 Shepherd, H. J., his Treatise on Election Law noticed and commended, 43.
 Smith, Rev. Sydney, article of, in the Edinburgh Review, on the allowance of counsel to prisoners, quoted, 396.
 Sugden, Sir E., his pamphlet on the state of the Appellate Jurisdiction, 128.
 Switzerland, present state of criminal legislature and jurisprudence in, 119.
See Germany.

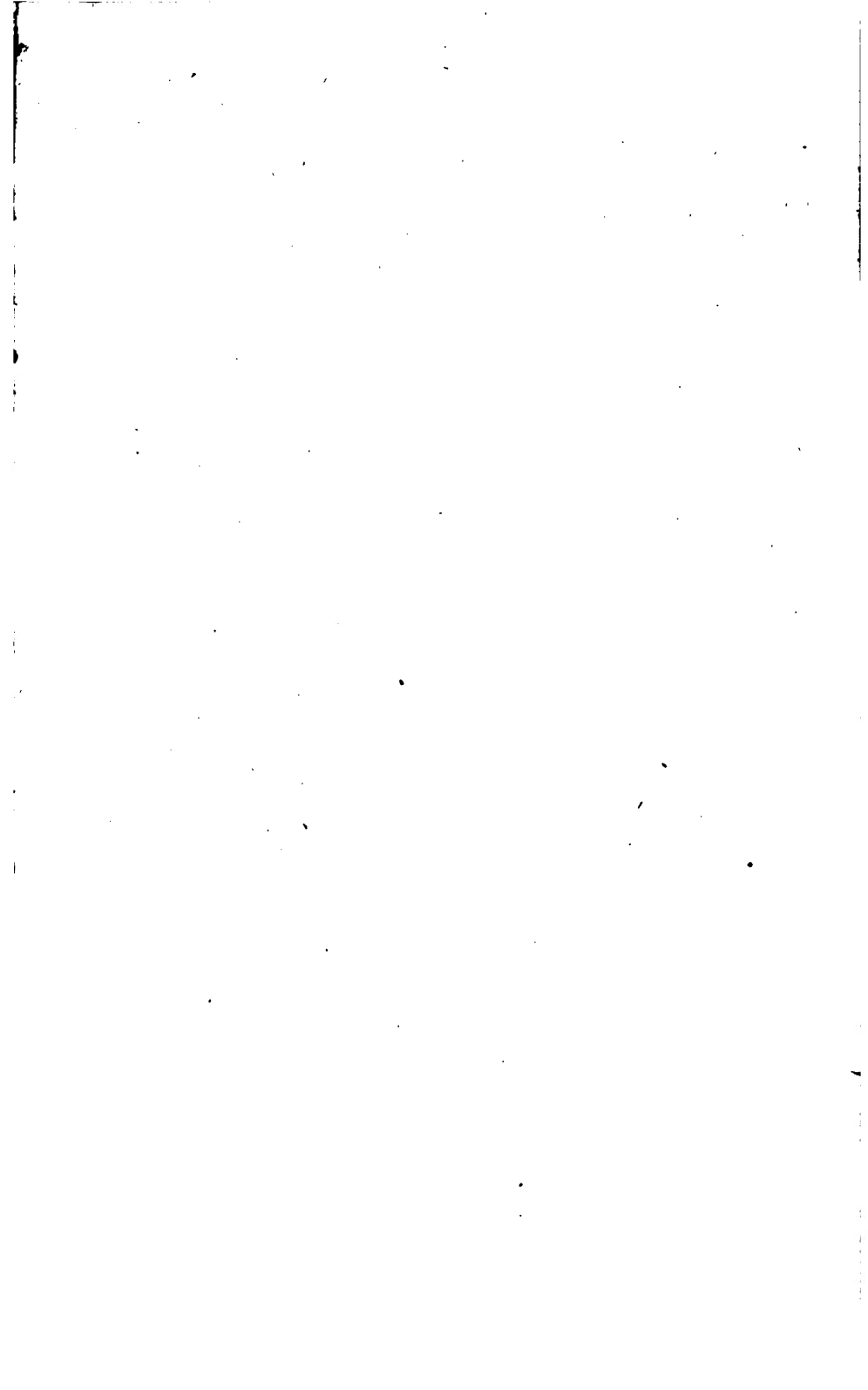
T.

- Talbot, Lord Chancellor, Life of, 43.
 his family, birth and education, *ib.*
 called to the bar, 44.
 elected to parliament, 45.
 appointed Solicitor-General, *ib.*;
 and Lord Chancellor, 47.
 the last *revel* in the Inner Temple Hall on his appointment, 48.
 his judicial character and demeanour, 50.
 the Duchess of Marlborough's opinion of him, 51.
 his illness and death, 52.
 universal encomiums on him, 53.
 his appearance and deportment, *ib.*
 his patronage of literature, 55.
 and excellent distribution of church patronage, 56.
 notices of his family, 57.
 summary of his character, 58.
 Tocqueville, M., his "Democracy in America," quotation from, 139.
 Trespass. *See Costs.*
 Tyrrell, Mr., his Bills for the Amendment of the Law relating to Wills, remarks on, 497.

W.

- Westminster Court of Requests, proposed extension of its jurisdiction, 237.
 Wills, Mr. Tyrrell's Bills relating to, 497.





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